89-5290

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

FRANK A. JAKOBOWSKI, ESQ.,

Petitioner,

vs.

BARRY D. DUBIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a finding of contempt and the imposition of sanctions by a Bankruptcy Court judge exceeds the authority granted an Article I judge.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
I. The Third Circuit's decision that the Bankruptcy Court has legal authority to hold a person in contempt is in direct conflict with decisions of the Ninth Circuit on an identical issue	4
II. The court below ignored the difference between Article I court authority and Article III court authority in making its determination.	7
Conclusion	11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 9, 10

In re Damon, 40 B.R. 367 (Bankr. S.D.N.Y. 1984) 9

In re Haddad, 68 B.R. 944 (Bankr. D. Mass 1987) 9

In re Miller, 16 B.C.D. 1187 (Bankr. M.D. Fl. 1984) 9

In re Sequoia Auto Brokers, Ltd., Inc., 827 F.2d 1281 (9th Cir. 1987) 6, 9

In re Walters, 868 F.2d 665 (4th Cir. 1989) 6, 9

Kellogg v. Chester, 71 B.R. 36 (N.D. Tex. 1987) 9

Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) 8, 9, 10

Omega Equipment Corp. v. John C. Lewis Co., Inc. (In re Omega Equipment Corp.), 51 B.R. 569 (D.D.C. 1985) 6, 9

Telewire Supply Corp. v. Presidential Financial Corp. (In re Industrial Tool Distributors, Inc.), 55 B.R. 746 (N.D. Ga. 1985) 6, 9

Contents

Page

Statutes Cited:

11 U.S.C. § 105 ..... 2, 6, 9

11 U.S.C. § 105(a) 4, 5, 9

28 U.S.C. § 134 7

28 U.S.C. § 152(a) 7, 8

28 U.S.C. § 157 ..... 2, 8

28 U.S.C. § 157(b)(1) 5, 8

28 U.S.C. § 157(c)(1) 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1471 (1982 repealed 1984) 8

Bankruptcy Amendment and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. Code Cong. & Admin. News (98 Stat. 33) 6, 7, 8, 9

United States Constitution Cited:

Article I 5, 7, 10

Article III 5, 7, 8, 10

Rule Cited:

Bankruptcy Rule 9020, Advisory Committee Note - 1987 Amendment 10

Contents

Page

Other Authority Cited:

Ferriell, "Constitutionality of Bankruptcy Amendment and Federal Judgeship Act of 1984," 63 The American Bankruptcy Law Journal 109 (Spring, 1989) ...7, 8, 9, 10

APPENDIX

Appendix A—Memorandum Opinion of the United States Court of Appeals for the Third Circuit Dated June 29, 1989 ..... 1a

Appendix B—Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania 8a

Appendix C—Opinion of the United States Bankruptcy Court for the Eastern District of Pennsylvania 16a

Appendix C—Order of the United States Bankruptcy Court for the Eastern District of Pennsylvania Dated April 8, 1988 ..... 39a

Appendix C—Memorandum of the United States Bankruptcy Court for the Eastern District of Pennsylvania..... 42a

Appendix C—Order of the United States Bankruptcy Court for the Eastern District of Pennsylvania Dated September 8, 1988 ..... 51a

Appendix D—Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania Dated February 8, 1985 ..... 54a

Appendix E—Relevant Statutes 58a

No.

In The

Supreme Court of the United States

October Term, 1989

FRANK A. JAKOBOWSKI, ESQ.,

Petitioner,

vs.

BARRY D. DUBIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Frank A. Jakobowski, Esq. ("Jakobowski") respectfully prays that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered June 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished, and is reproduced in the Appendix at 1a to 7a. The memorandum

opinion and order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced in the Appendix at 8a to 15a. The opinion of the United States Bankruptcy Court for the Eastern District of Pennsylvania was published at 84 B.R. 377 (Bankr. E.D. Pa. 1988) and is reproduced in the Appendix at 15a to 41a. The memorandum of the United States Bankruptcy Court for the Eastern District of Pennsylvania is unreported and is reproduced in the Appendix at 42a through 53a. The memorandum and order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced in the Appendix at 54a through 57a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on June 29, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

28 U.S.C. § 157 and 11 U.S.C. § 105 are set forth in the Appendix at 58a to 62a.

STATEMENT OF THE CASE

Petitioner is a practicing attorney in the Commonwealth of Pennsylvania and at all times relevant to this action represented a creditor of the respondent. Petitioner had successfully prosecuted an action against the respondent in the Court of Common Pleas, Philadelphia County and obtained judgment in the amount of three thousand two hundred eight ($3,208) dollars. Execution proceedings were commenced against respondent's checking account.

Unbeknownst to petitioner or his client, respondent filed a

bankruptcy petition. Petitioner's client was not listed in the bankruptcy schedules; rather, petitioner's client was listed falsely as a "terminated suit" in respondent's statement of affairs.

Approximately nine months after respondent's bankruptcy filing, on January 30, 1984, petitioner learned of the filing. Petitioner admittedly knew neither bankruptcy law nor procedure; therefore, he was unaware of his purported responsibility to dissolve the writ of execution.

Respondent, rather than filing a motion with the Bankruptcy Court to obtain an uncontested order to dissolve the writ, filed a motion for contempt to hold petitioner's client in contempt. The hearing was held despite petitioner's inability to be present, and an order was issued directing that petitioner's client be held in contempt for every day that the writ was not dissolved beyond March 2, 1984. The Bankruptcy Court also ordered that the client be responsible for notifying petitioner to dissolve the writ.

When the writ was not dissolved, respondent filed a motion for a preliminary injunction against petitioner. Hearings were held which petitioner did not attend. A further order was issued ordering petitioner to dissolve the writ. Petitioner appealed the order to the District Court, and obtained a stay pending the appeal.

While the appeal was pending before the District Court, petitioner filed further pleadings in the Court of Common Pleas seeking supplementary relief in aid of execution of his client's judgment. Respondent responded to the motion which was denied.

On February 8, 1985, the District Court affirmed the Bankruptcy Court's order requiring the petitioner to dissolve the writ. No more than two weeks later, petitioner filed the appropriate documents to dissolve the writ of execution.

Petitioner then pursued the adversary proceeding against him. Following the hearing in the Bankruptcy Court, at which testimony was taken, the court found petitioner to have been in civil contempt of the Bankruptcy Court and awarded compensatory damages to respondent in the amount of two thousand two hundred fifty ($2,250) dollars in compensatory damages. Also awarded were attorney's fees in the amount of fifteen thousand four hundred eighty ($15,480) dollars and three hundred sixty-one ($361) dollars in costs. This decision was affirmed by both the District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's decision that the Bankruptcy Court has legal authority to hold a person in contempt is in direct conflict with decisions of the Ninth Circuit on an identical issue.

The Third Circuit decided that the Bankruptcy Court could hold an individual in civil contempt pursuant to 11 U.S.C. § 105(a). At the time pertinent to this case, Title 11 U.S.C. § 105(a) stated as follows:

> The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

In a footnote, the Third Circuit believes that by its amendment, Congress intended in Title 11 U.S.C. § 105(a) to include such proceedings as civil contempt hearings because it added the following language:

> No provision of this title providing for the raising

> of an issue by a party in interest shall be construed to preclude the Court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules or to prevent an abuse of process.

The Court reached this decision despite the holding of *In re Sequoia Auto Brokers, Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987) wherein the Ninth Circuit decided a case in which a Bankruptcy Court had found a debtor in civil contempt for invoking the Fifth Amendment in response to questions. The issue before the court was "whether a bankruptcy judge has jurisdiction to issue a civil contempt order". *Id.* at 1283.

The Ninth Circuit discussed whether a bankruptcy judge had inherent authority to exercise contempt power or whether the contempt jurisdiction was derivative from express or implied statutory authority.

The Ninth Circuit recognized that as Bankruptcy Courts are not Article III courts, there is no inherent authority to issue a contempt order. Rather, such authority would be necessarily dependent upon congressional authorization. *Id.*

After extensive analysis of the difference between Article I courts and Article III courts, the Ninth Circuit concluded that not only is there no inherent authority, but there is no "express" statutory authority granting contempt power to bankruptcy judges.

Additionally, after considering whether there was any implied authority to consider the granting of contempt power to bankruptcy judges, the Ninth Circuit analyzed 28 U.S.C. § 157(b)(1) and concluded that neither § 157 of Title 28 nor § 105 of the Bankruptcy Code conferred, either express or implied, contempt power to bankruptcy judges. *Id.* at 1285.

It was argued that because the contempt issue in *Sequoia, supra,* arose in the context of a "core" proceeding, the contempt should have been treated as derivative of the initial core proceeding. The Ninth Circuit concluded that the Bankruptcy Court had no jurisdiction to issue contempt orders.

The decisions of the Ninth Circuit and the Third Circuit, which dealt with identical issues, that is, issues of the contempt powers of the Bankruptcy Court, are totally inapposite. There are other cases in the district courts that address the issue of the authority of a bankruptcy judge to issue contempt orders, *see, e.g., Telewire Supply Corp. v. Presidential Financial Corp. (In re Industrial Tool Distributors, Inc.),* 55 B.R. 746, 751-752 (N.D. Ga. 1985) ("Delegation of contempt powers to bankruptcy judges which arguably exist under 11 U.S.C. § 105 is unconstitutional"); *Omega Equipment Corp. v. John C. Lewis Co., Inc. (In re Omega Equipment Corp.),* 51 B.R. 569, 571-73 (D.D.C. 1985) (the power to sanction or punish for contempt is the "distinguishing characteristic of an officer who exercises the sovereign's judicial power, and of no other").

The conflict created by the decisions of the Third and Ninth Circuits must be directly addressed by this Court. By reaching a conclusion different from another Circuit, the Third Circuit has injected further confusion on an issue that should be straightforward. *Cf., In re Walters,* 868 F.2d 665 (4th Cir. 1989).

The conflict created by these decisions is a serious one in that the delegation of contempt powers is one which questions the constitutionality of the Bankruptcy Amendment and Federal Judgeship Act of 1984.[1]

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1. Bankruptcy Amendment and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. Code Cong. & Admin. News (98 Stat. 33) hereinafter (Cont'd)

There must be uniformity among the Circuits in whether or not the Bankruptcy Court has the authority to issue contempt orders and subsequently sanctions.

II.

The court below ignored the difference between Article I court authority and Article III court authority in making its determination.

The courts are created by virtue of Article III of the Constitution. Article I of the Constitution permits Congress to create "Tribunals inferior to the supreme court". Article III judges are appointed differently. District court judges are appointed to hold their offices for life, 28 U.S.C. § 134. On the other hand, bankruptcy judges are appointed after:

> Considering the recommendations of the Judicial Conference submitted pursuant to Sec. b, each bankruptcy judge shall be appointed for a term of fourteen years, subject to provisions of Subsection e. Bankruptcy judges shall serve as *judicial officers* of the United States district court established under Article III of the Constitution.[2]

(Cont'd)
referred to as "BAFJA". *See* Ferriell, "*Constitutionality of Bankruptcy Amendment and Federal Judgeship Act of 1984*", 63 *The American Bankruptcy Law Journal* 109 (Spring, 1989).

2. Subsection b refers to the Judicial Conference of the United States as the authority to submit the names of candidates to be bankruptcy judges. Subsection e refers to the removal of a bankruptcy judge during term for certain enumerated acts including incompetence, misconduct, neglect of duty, or disability, either physical or mental.

(Emphasis added.) 28 U.S.C. § 152(a).

From the section regarding the appointment of bankruptcy judges, it is clear that Congress intended to treat them differently than judges appointed pursuant to Article III of the Constitution. They are merely judicial officers, not United States District Court judges.

The Bankruptcy Reform Act of 1978 attempted to increase the powers of the Bankruptcy Court jurisdiction, 28 U.S.C. § 1471 (1982) (repealed 1984). Exclusive power was given to the Bankruptcy Court to hear both state and congressionally-created rights which were subject only to appellate review. The case of *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) found the expansive powers of the Bankruptcy Reform Act unconstitutional.

BAFJA was enacted in part as a response to the Supreme Court's ruling in *Northern Pipeline, supra. See In re Sequoia, supra.* Specifically, Title 28 U.S.C. § 157 enumerates certain core proceedings which bankruptcy judges may hear. 28 U.S.C. § 157(b)(1) discusses related jurisdiction that the court could constitutionally hear. Title 28 U.S.C. § 157(c)(1) deals with those actions which are not core proceedings but otherwise "related to a case under Title 11". It is conceded that the list of core proceedings is not an all-inclusive list but, however, bankruptcy law permits the court to make a final determination in a core proceeding only if the proceeding is one that arises under Title 11, not if the action is merely related to a bankruptcy case. *Ferriell, supra* at 137.

Whether contempt power is extended to the Bankruptcy Court is questionable. BAFJA says nothing in connection with the Bankruptcy Court's authority to issue contempt citations, *Id.* at 140. The law itself is silent on the issue of contempt. The Court

of Appeals for the Third Circuit believes that 11 U.S.C. § 105 gives the court authority to issue contempt citations and sanctions.

Section 105(a) of Title 11 indicates that the court may issue any order, but it is unclear as to whether it was intended to include an order for which the court does not have constitutional authority to impose. Section 105(a) confers power to issue procedural orders necessary or appropriate to the Bankruptcy Court's jurisdiction, *Sequoia, supra* at 1290.

Cases can be cited from many jurisdictions on both sides of the issue of whether there is constitutional authority for the Bankruptcy Court to hold a party in civil contempt.[3]

Those cases which permit a finding of contempt, ignore the effect of the decision of *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) which recognized the constitutional infirmities in the Bankruptcy Reform Act and led to the BAFJA. It was submitted that similar constitutional infirmities exist in the 1984 Amendments, specifically with regard to the contempt powers of the Bankruptcy Court. *See Ferriell, supra.*

Review by this Court is necessary to remedy the Third and Fourth Circuits' disregard for this Court's precedent concerning legislative courts and to conform to Constitutional mandates. *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833

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3. *In re Haddad*, 68 B.R. 944 (Bankr. D. Mass. 1987); *Kellogg v. Chester*, 71 B.R. 36 (N.D. Tex. 1987); *In re Walters*, 868 F.2d 665 (4th Cir. 1989); *In re Miller*, 16 B.C.D. 1187 (Bankr. M.D. Fl. 1984); *In re Damon*, 40 B.R. 367 (Bankr. S.D.N.Y. 1984) — bankruptcy court has constitutional authority to issue contempt and impose sanctions. *Telewire Supply Corp. v. Presidential Corp. (In re Industrial Tool Distribributors, Inc.)*, 55 B.R. 746 (N.D. Ga. 1985); *Omega Equipment Corp. v. John C. Lewis Co., Inc. (In re Omega Equipment Corp.)*, 51 B.R. 579 (D.D.C. 1985) — bankruptcy court lacks the constitutional authority to issue contempt and impose sanctions.

(1986), *Ferriell, supra* at 129, 136. While it could be argued that there is statutory authority, albeit vague, for contempt powers, said authority must still come from the Constitution. *Northern Pipeline, supra,* made it clear that the Bankruptcy Courts are Article I or legislative courts.

The Advisory Committee to the 1987 Amendments of Bankruptcy Rule 9020 is cognizant of the fact that bankruptcy judges may lack the authority to issue contempt and the note says in pertinent part:

> The United States Bankruptcy Courts, as constituted under the Bankruptcy Reform Act of 1978, were courts of law, equity and admiralty with an inherent contempt power, but the former 28 U.S.C. Sec. 1481 restricted the criminal contempt power of bankruptcy judges. Under the 1984 amendments, bankruptcy judges are judicial officers of the district court, 28 U.S.C. Sec. 151, 152 (a)(1). There is no decision by the Court of Appeals concerning the authority of bankruptcy judges to punish for either civil or criminal contempt under the 1984 Amendments. *This rule, as amended, recognizes that the bankrupcy judges may not have the power to punish for contempt.*

(Emphasis added.) Bankruptcy Rule 9020, Advisory Committee Note - 1987 Amendment.

As an Article I court, the Bankruptcy Court's powers are more limited than the powers granted to an Article III court. As such, the Bankruptcy Court does not have the authority to make findings of contempt or to impose sanctions. The split among the Third, Fourth and Ninth Circuits compels resolution by this Court.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE T. PHELAN
Counsel of Record
JOAN S. PINSKY
Attorneys for Petitioner

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 29, 1989

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-1121/1122

IN RE: STEPHEN W. GROSSE, P.C. t/a MARTIN GORMAN DENTAL PAVILION, ET AL.

Debtor

BARRY A. DUBIN

v.

FRANK A. JAKOBOWSKI, ESQ.,

Appellant.

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 88-3792) & (D.C. Civ. No. 88-7969, District Judge: Hon. John P. Fullam

Submitted Under Third Circuit Rule 12(6)
June 15, 1989

Before: SLOVITER and COWEN, *Circuit Judges,*
and ROTH, *District Judge**

---

* Honorable Jane R. Roth, of the United States District Court for the District of Delaware, sitting by designation.

Appendix A

(Filed June 29, 1989)

MEMORANDUM OPINION

COWEN, *Circuit Judge.*

Frank Jakobowski, a Pennsylvania attorney, appeals an order of the district court, affirming orders of the bankruptcy court, which found Jakobowski to be in contempt of that court, and ordered him to pay damages in the amount of $2550, and his adversary's attorney's fees and costs, determined to be $15,480 and $361, respectively. We find that the bankruptcy court did not err when it concluded that Jakobowski's conduct constituted contempt, and we also reject Jakobowski's argument that the bankruptcy court lacked authority to hold him in contempt. Accordingly, we will affirm the order of the district court.

I.

The series of events culminating in the orders at issue in this case began in 1983, when Jakobowski, representing a client named Wolk, obtained for his client a judgment in the amount of $3,208 against a dentist named Dubin in the Philadelphia Court of Common Pleas. Shortly thereafter, in April of 1983, Dubin filed for bankruptcy. Dubin's Schedule of Assets and Liabilities did not list the Wolk judgment as a debt although his Statement of Affairs did list it. Wolk (and his attorney Jakobowski) apparently were not notified of the bankruptcy filing.

In January 1984, while still apparently unaware of the bankruptcy petition, Jakobowski issued execution of the Wolk judgment and attached Dubin's bank account. On January 30, 1984, Dubin's attorney notified Jakobowski of the Dubin

bankruptcy filing by letter and requested that he dissolve the writ of execution. Jakobowski took the position that since his client Wolk had not been listed as creditor in Dubin's bankruptcy petition, he was under no obligation to dissolve the writ.

Dubin's attorney filed a motion to find Wolk in contempt of the automatic stay on February 3, 1984. Wolk appeared, without Jakobowski, at a hearing on the motion on February 27, 1984. The bankruptcy judge found that the attachment was in violation of the automatic stay created by the bankruptcy petition, and ruled that Wolk would be in contempt unless that writ were promptly dissolved, and would be subject to a daily fine for each day the attachment remained in effect after March 2, 1984. The bankruptcy court also ordered Wolk to instruct Jakobowski to dissolve the attachment and withdraw the writ of execution.

On March 1, 1984, Wolk wrote a letter to the bankruptcy court which stated that he had instructed Jakobowski to dissolve the writ, but that Jakobowski refused to do so. Dubin then brought an adversary proceeding against Jakobowski, seeking a preliminary injunction and other relief. An initial hearing was scheduled on this matter, but Jakobowski did not appear, so the matter was continued to another date. At the second scheduled hearing, Wolk appeared, but again, Jakobowski did not. The bankruptcy judge proceeded in his absence, and entered an order, dated April 26, 1984, which directed Jakobowski to take immediate steps to dissolve the attachment.

Jakobowski appealed the April 26 order to the district court, also seeking a stay of the order pending the appeal. Jakobowski's motion for a stay was granted on the condition that he file a $10,000 supersedeas bond with a corporate surety. Jakobowski filed the bond on May 29, 1984.

Appendix A

While Jakobowski's appeal was pending before the district court, he filed a petition with the Court of Common Pleas seeking supplementary relief in aid of execution of the Wolk judgment. Dubin, of course, was forced to respond to this motion, which was eventually denied.

On February 8, 1985, the district court affirmed the bankruptcy court's order of April 26, 1984 requiring Jakobowski to dissolve the Writ. More than two weeks later, on February 26, 1985, Jakobowski filed a Praecipe to dissolve the writ of execution. He did not, however, inform Dubin that he had taken this action, and Dubin's attorney wrote the bankruptcy court seeking an order dissolving the writ because the bank account at issue was still "frozen". Jakobowski was sent a copy of this letter, and despite the fact that he knew the writ had been dissolved, did nothing to inform Dubin or the bankruptcy court of that fact. In response to Dubin's attorney's letter, the bankruptcy court entered an order declaring the Writ null and void on June 17, 1985.

Jakobowski then pursued the matter of the adversary proceeding against him, filing motions to dismiss the complaint and, eventually an answer to the complaint. Following a hearing before the bankruptcy court, at which testimony was taken, the court found Jakobowski to have been in civil contempt of the bankruptcy court, and awarded Dubin $2,550 in compensatory damages, as well as attorney's fees and costs, which were determined to total $15,480 and $361, respectively. The bankruptcy court judgment was affirmed by the district court, and Jakobowski now appeals to this Court. Dubin responds to that appeal, and also seeks double costs and attorney's fees pursuant to Fed.R.App.P. 38 as sanctions. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Appendix A

III.

Jakobowski makes two arguments on this appeal. First, he argues that the bankruptcy and district courts erred when they found that his course of conduct placed him in civil contempt of the bankruptcy court. Second, he argues that the bankruptcy court lacked the legal authority to find him in civil contempt.

Addressing the first of these arguments, we have little trouble concluding that Jakobowski's continuing refusal to dissolve the writ of attachment in the Court of Common Pleas, and his filing of a pleading in an attempt to enforce that judgment, placed him in contempt of the automatic stay created by the filing of the Dubin bankruptcy petition. While Jakobowski's client Wolk was not listed as a creditor in the Schedule of Assets and Liabilities, there is no question that Jakobowski learned of the petition by January 30, 1984. Once he had learned of the petition and the stay, his continuing refusal to dissolve the writ, and his attempt to enforce it by filing a pleading in the Court of Common Pleas, were clearly attempts to circumvent the stay created by the bankruptcy filing. Jakobowski's violations of the automatic stay were sufficient to find him in civil contempt.

We also agree with the bankruptcy court that it has the legal authority to hold a person in civil contempt. Title 11 U.S.C. § 105(a), as in effect at the time of the actions at issue here, stated that:

> The Court may issue any order, process, or judgment that is necessary or appropriate to carry

out the provisions of this title.[1]

We agree with the Court in *In Re Walters*, 868 F.2d 665 (4th Cir. 1989), that the plain language of this provision grants the bankruptcy court authority to hold an individual in civil contempt. *Id.* at 669; *but see In re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987) (holding that section 105(a) does not confer contempt power on the bankruptcy courts). We also find that this delegation of the contempt power to the bankruptcy courts under section 105(a) is constitutional; the determination of whether a person is in contempt of an order of the bankruptcy court does not involve private rights under non-bankruptcy law, and it is therefore constitutionally permissible for the bankruptcy court to make this determination, even under the plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). *See Walters*, 868 F.2d at 670.[2]

III.

We will affirm the order of the district court, which affirmed the orders of the bankruptcy court finding Jakobowski in civil contempt. We decline, however, to grant double costs and attorney's fees to Dubin pursuant to Rule 38. Costs taxed against appellant.

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1. The section has since been amended to add the following sentence: "No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules or to prevent an abuse of process."

2. The constitutional power of the bankruptcy court to find a person in civil contempt of one of its orders is now further buttressed by Bankruptcy Rule 9020, which gives a person found in civil contempt of the bankruptcy court the opportunity to seek *de novo* review of that finding in the district court, if the contempt did not occur in the presence of the bankruptcy judge.

Appendix A

To the Clerk of Court:

Please file the foregoing Opinion.

s/ Robert E. Cowen
C.J.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Filed January 27, 1989 Entered January 30, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BKY No. 83-1694G(F)
ADV. NO. 84-297G(F)

In Re:

STEPHEN W. GROSSE, BARRY A. DUBIN, D.D.S., P.C. f/d/a DENTAL DIMENSIONS, et al.

Debtors

CIVIL ACTION
No. 88-3792

BARRY D. DUBIN,

Plaintiff

v.

FRANK JAKOBOWSKI, ESQ.,

Defendant

CIVIL ACTION
No. 88-7969

BARRY D. DUBIN,

Plaintiff

v.

FRANK JAKOBOWSKI, ESQ.,

Defendant

Appendix B

MEMORANDUM AND ORDER

FULLAM, Ch.J. JANUARY 27, 1989

These consolidated appeals challenge Orders entered by the Bankruptcy Court which respectively require the defendant Frank Jakobowski to pay damages in the sum of $2550 as a sanction for contempt of the Bankruptcy Court, and to pay $15,480 in attorney's fees plus $361 in costs incurred by his adversaries as a result of his contumacious conduct.

It all started in 1983, when Mr. Jakobowski, on behalf of a client named Wolk, sued a dentist named Dubin and obtained judgment against him in the amount of $3,208 in the Philadelphia Court of Common Pleas. *Wolk v. Dubin, et al.*, No. 1095 Feb. Term 1982. Shortly thereafter, on April 20, 1983, Dubin filed for bankruptcy. In January 1984, apparently unaware of the bankruptcy proceeding, Mr. Jakobowski issued execution on the judgment and attached Dubin's bank account. On January 30, 1984, Jakobowski was formally notified of the pendency of the bankruptcy proceeding and the attendant automatic stay, and was requested to dissolve the attachment. Mr. Jakobowski did not accede to that request.

Counsel for the debtor petitioned the Bankruptcy Court for an adjudication of contempt against Jakobowski's client, Wolk. At a hearing on February 27, 1984, Wolk appeared, but Jakobowski did not. The bankruptcy judge ruled that Wolk would be in contempt unless the attachment were promptly dissolved, and would be subject to a daily fine for each day the attachment remained in effect beyond March 2, 1984. The Bankruptcy Court also ordered Wolk to instruct his counsel, Jakobowski, to dissolve the attachment and withdraw the writ of execution. On March

1, 1984, Wolk wrote a letter to the Bankruptcy Court, stating that he had instructed Jakobowski to dissolve the attachment, but that Jakobowski refused to comply with that request.

The debtor thereupon brought an adversary proceeding against Jakobowski, and sought a preliminary injunction and other relief. Neither Jakobowski nor his client appeared at the first hearing, so the matter was continued. At the continued hearing, Wolk appeared (having been subpoenaed to do so), but Jakobowski sent word that he would be a half-hour late. He did not appear, however, and the hearing proceeded in his absence. The bankruptcy judge entered an Order on April 26, 1984, directing Jakobowski to take immediate steps to dissolve the attachment on the debtor's bank account. Instead of complying, Jakobowski appealed to this court. The bankruptcy judge's Order was affirmed, by Memorandum and Order entered February 8, 1985. In the course of that Memorandum, I noted that none of Jakobowski's arguments had "even colorable merit".

In the meantime, while that appeal was pending before this court, Jakobowski had petitioned the Court of Common Pleas for "supplementary relief in aid of execution" in a further effort to enforce the Common Pleas judgment against Dubin, in plain defiance of the automatic stay and of the Orders of the Bankruptcy Court. It was necessary for the debtor's counsel to litigate that matter in the Court of Common Pleas, which, needless to say, denied Jakobowski's petition.

After this court's February 8, 1985 affirmance of the bankruptcy judge's Order, Jakobowski waited two weeks and then did, at long last, cause the attachment of the bank account to be withdrawn. He did not, however, inform the debtor, the debtor's counsel, or the bankruptcy court that he had done so.

Appendix B

Under the impression that the attachment was still in effect, the debtor's counsel wrote to the bankruptcy judge, requesting an adjudication that the Common Pleas attachment was null and void. He sent a copy of that letter to Mr. Jakobowski, with the request that Jakobowski inform the court of any misstatements or errors in the letter. Jakobowski took no action, thus permitting both the Bankruptcy Court and the debtor's counsel to proceed on the assumption that the attachment was still in effect; this resulted in further proceedings in the Bankruptcy Court, culminating in a June 17, 1985 Order declaring the attachment null and void.

In September 1986, Jakobowski filed a second motion to dismiss the Complaint for injunctive and other relief. After briefing an argument, this motion was denied, and the case proceeded to hearings on the merits, which were held on April 1 and April 15, 1987. On April 8, 1988, the Bankruptcy Court awarded the debtor $2550 in compensatory damages, plus attorney's fees to be determined later. On September 7, 1988, after a further hearing on the matter of counsel fees, the Bankruptcy Court entered the second Order involved in this appeal, awarding $15,480 in counsel fees plus $361 in costs. These timely appeals followed, and were consolidated.

There can be no doubt that the Bankruptcy Court correctly decided all legal and factual issues in this case. Appellant's arguments, throughout this unnecessarily lengthy litigation, have been and continue to be devoid of merit.

Giving appellant the benefit of the doubt, it has been assumed throughout these proceedings that, when he initially issued execution on the state court judgment, Mr. Jakobowski did not know that a bankruptcy petition had been filed earlier, and that

the automatic stay was in effect. I continue to endorse that assumption, although it may be significant that, in the early stages of the case, appellant seemed to be arguing that the garnishment of the bank account did not violate the automatic stay because the debtor had not notified him of the bankruptcy; some parts of the record can be interpreted as suggesting that appellant was relying on the lack of formal notice, rather than asserting an actual lack of knowledge. Be that as it may, appellant was not, and is not now, charged with misconduct in obtaining the writ of attachment, but for his failure to withdraw the writ after being formally notified of the bankruptcy stay. Knowingly permitting the attachment to continue was, of course, a direct and intentional violation of the stay order. The contempt was exacerbated by appellant's later attempt to enforce the judgment, in outright defiance of the Order of the Bankruptcy Court (from which a totally frivolous appeal had been taken).

Appellant has argued that, at the time of the conduct in question, the Bankruptcy Court did not have the legal authority to exercise contempt power. There was, for a time, a great deal of uncertainty on that issue, which has since been clarified by statute and rule change. Judge Fox's Opinion adequately addresses the issue and, in my view, correctly demonstrates that the Order was proper. In any event, the original contempt order was affirmed by this court in 1985 and, so far as appellant and the Bankruptcy Court are concerned, established the law of the case. Appellant's subsequent conduct should have been governed by that determination.

Appellant does not contest the Bankruptcy Court's calculations which resulted in the attorney's fee award, but argues that the whole problem could have been resolved with minimal effort by debtor's counsel. Instead of trying to get appellant to

withdraw the state court execution, says Mr. Jakobowski, the debtor should have proceeded earlier in the Bankruptcy Court to obtain an order rendering the attachment null and void. This is disingenuous, to put it kindly. It was Mr. Jakobowski who erroneously insisted that he need not lift a finger to withdraw the writ of execution, and that it was up to debtor and debtor's counsel to undo the wrong previously committed by the appellant. And the judgment was pending in, and the writ of execution issued by, the Court of Common Pleas. Had Mr. Jakobowski done what he clearly was obligated to do, none of these counsel fees and expenses would have become necessary. Debtor's counsel proceeded appropriately, and Mr. Jakobowski is in no position to contend that the fees would have been less if only his opponents had agreed with his patently erroneous position in the matter.

The Orders appealed from will therefore be affirmed, for the reasons discussed above, and for the reasons more completely elaborated in the Opinions of the Bancruptcy Court.

One further issue must be mentioned. The debtor argues that these appeals are frivolous, and that double costs and attorney's fees should be awarded pursuant to Fed. R. App. Proc. 38. But the Federal Rules of Appellate Procedure apply only to appeals pending in a court of appeals, *see* Fed. R. App. Proc. 1; and Rule 38 itself makes clear that the authority therein conferred may be exercised only by courts of appeals. *See also In re American President Lines,* 779 F.2d 714, 717 (D.C. Cir. 1985). The application under Rule 38 will therefore be denied.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BKY No. 83-1694G(F)
ADV. NO. 84-297G(F)

In Re:

STEPHEN W. GROSSE, BARRY A. DUBIN, D.D.S., P.C. f/d/a DENTAL DIMENSIONS, et al.

Debtors

CIVIL ACTION
NO. 88-3792

BARRY D. DUBIN,

Plaintiff

v.

FRANK JAKOBOWSKI, ESQ.,

Defendant

O R D E R

AND NOW, this 27th day of January, 1988, it is ORDERED:

1. That the Bankruptcy Court's Order of April 8, 1988 is AFFIRMED.

2. That the Bankruptcy Court Order of September 8, 1988 is AFFIRMED.

Appendix B

3. That these appeals are DISMISSED.

s/ John P. Fullam
Ch.J

APPENDIX C — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chapter 7
Bankruptcy No. 83-01694G

In re

STEPHEN W. GROSSE, P.C. t/a MARTIN GORMAN DENTAL PAVILION, GERMANTOWN DENTAL PAVILION, DENTAL PAVILION DENTAL DIMENSIONS, DENTAL DIMENSIONS SOUTH STREET PROF BLDG., ASSOCIATED DENTAL GROUP, LTD., BARRY A. DUBIN, DDS AND ASSOC., STEPHEN W. GROSSE, P.C. DENTAL PAVILION, GERMANTOWN DENTAL, GIRARD DENTAL, MARKET STREET DENTAL PAVILION, MARKET DENTAL

Jointly Administered with

Bankruptcy No. 83-01693
Bankruptcy No. 83-01695
Bankruptcy No. 83-01696

Debtors

Adversary No. 84-0297G

BARRY A. DUBIN

Plaintiff

v.

FRANK A. JAKOBOWSKI, ESQUIRE

Defendant

Appendix C

OPINION

By BRUCE FOX, Bankruptcy Judge:

The threshhold issue before me for determination is whether the defendant, as attorney for a creditor of the plaintiff, violated the automatic stay and/or an order of this court. If the answer to that question is yes, I must determine the appropriate measure of damages. Pursuant to Bankr. Rule 7052, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff, Dr. Barry A. Dubin ("Dubin") is a dentist who filed a voluntary petition in bankruptcy on April 20, 1983.

2. The defendant, Mr. Frank Jakobowski ("Jakobowski") was attorney for Robert Wolk ("Wolk"), a judgment creditor of Dubin. Wolk held a judgment against Dubin, emerging from Dubin's responsibility for a debt of one of his former partners, in the total amount of $3,208.00.

3. Dubin did not list his debt to Wolk on his bankruptcy schedules and did not list Wolk on his mailing matrix.

4. On January 23, 1984, subsequent to the bankruptcy filing, Wolk, by his attorney, began garnishment proceedings by attaching Dubin's business bank account. As of that date neither Wolk nor Jakobowski had notice of Dubin's bankruptcy filing.

5. On January 30, 1984, Dubin's attorney notified Jakobowski by letter and telephone of the existence of Dubin's bankruptcy. Dubin's attorney requested that Jakobowski dissolve the writ of execution.

Appendix C

6. At some point on or after January 30, 1984, Jakobowski told Dubin's attorney that he believed that Wolk was under no obligation to dissolve the writ because Wolk had not been listed as a creditor on Dubin's bankruptcy petition.

7. On February 3, 1984, Dubin's attorney filed a motion for contempt against Wolk in this court. On February 27, 1984,[1] at the hearing on the motion, Wolk appeared without counsel. Former Chief Judge Goldhaber heard testimony and entered an order holding Wolk in contempt and ordering *in terrorem* damages of $200.00 per day for every day beyond March 2, 1984 for which Wolk did not cause the writ to be dissolved.

8. On or about March 1, 1984, Wolk informed the court and counsel for Dubin by letter that he had requested that Jakobowski dissolve the writ and that Jakobowski had refused. Jakobowski testified that although Wolk had informed him of Judge Goldhaber's February 27, 1984 order, Wolk never asked him to dissolve the writ. (N.T. 4/15/87 pp. 86-92).

9. On March 28, 1984, the instant adversary proceeding was filed by Dubin against Jakobowski individually. The complaint sought injunctive relief and damages.

10. Subsequently, on April 26, 1984, a hearing was scheduled on Dubin's motion for injunctive relief. Jakobowski failed to appear and Judge Goldhaber entered a preliminary injunction directing Jakobowski to immediately dissolve the writ. Jakobowski testified in this proceeding that he was precluded from appearing

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1. Neither Wolk nor Jakobowski appeared at the initially scheduled hearing on the motion and the hearing was continued to February 27, 1984, at the request of Dubin's counsel.

at the hearing because he was testifying on the same day as an expert witness in another matter pending in this courthouse. (N.T. 1/15/87 p. 73).

11. On May 4, 1984, Jakobowski filed a notice of appeal of the order granting a preliminary injunction together with a motion for stay pending appeal. Judge Goldhaber granted a stay pending appeal conditioned upon posting of a bond in the amount of $10,000.00. Apparently, such bond was later posted.

12. Without obtaining relief from the automatic stay, on June 6, 1984 Jakobowski filed a petition for supplementary relief in aid of execution concerning the Wolk judgment against the debtor in the Philadelphia Court of Common Pleas. That petition was subsequently denied.

13. On February 8, 1985, Chief Judge Fullam of this district affirmed Judge Goldhaber's order of April 26, 1984, which required Jakobowski to dissolve the writ.

14. On February 26, 1985, Jakobowski filed a praecipe dissolving the writ of execution without informing Dubin, his counsel or the court of his action.

15. Subsequently, because he was unaware that the writ had been dissolved, Dubin's counsel requested and Judge Goldhaber granted an order declaring the writ to be null and void.

16. The bank account subject to Wolk's writ of execution held Dubin's working capital as of the date his bankruptcy petition was filed. From the date on which the account was frozen until June 17, 1985, when Judge Goldhaber ultimately declared the writ null and void, Dubin made regular attempts to withdraw

funds from the account and was precluded from doing so by the existence of the writ.

17. At all times relevant to this action, Jakobowski was aware that he alone could dissolve the writ. (N.T. 4/15/87 pp. 86, 92). From January 30, 1984, Jakobowski had knowledge of the existence of the automatic stay as it applied to Dubin and to property of Dubin's bankruptcy estate. From, at least February 27, 1984, when Judge Goldhaber ordered Wolk to have the writ dissolved or face contempt sanctions, Jakobowski was aware of his responsibility to dissolve the writ.[2]

18. By failing to dissolve the writ after February 27, 1984, Jakobowski made a deliberate and willful choice to violate the automatic stay. Additionally, by subsequently filing a petition for supplementary relief in aid of execution in state court, Jakobowski further deliberately and willfully violated the automatic stay.

19. Dubin testified that he appeared in this court in this matter on nine dates between 1984 and 1987 and on each date he was forced to cancel numerous dental appointments. In each case however, the appointments were rescheduled. (N.T. 4/15/87 pp. 4, 7, 51-52). Thus, Dubin did not suffer any lost income due to cancelled appointments by reason of his appearances in court.

20. Dubin's payroll during the pendency of this action was

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2. It is difficult to accept Jakobowski's testimony that Wolk never asked him to withdraw the writ, given the fact that sanctions against Wolk would have quickly exceeded the amount of the judgment. However, even assuming the truth of Jakobowski's testimony, the fact that Wolk had been held in contempt was clear notice to Jakobowski that the court considered the writ violative of the automatic stay.

approximately $700.00 for a six day work week. On those days when Dubin appeared in court, he had to cancel all appointments but nevertheless pay his employees. (N.T. 4/15/87 pp. 6-7). The wages which Dubin had to pay on nine days when his office was effectively closed by his absence to appear before the court in this matter constitute $1,050.00 and are an appropriate element of compensatory damages.

21. Dubin failed to establish that a security deposit required by his landlord was caused by Jakobowski's actions or that he was harmed by the requirement insofar as the deposit is refundable.

22. Dubin failed to establish that a less favorable credit arrangement with his advertising agency was caused by Jakobowski's actions or that he was harmed by having to pay cash rather than credit to the agency.

23. Dubin failed to establish that a less favorable arrangement with his dental lab or with the telephone company was caused by Jakobowski's actions.

24. Dubin testified that his emergency need for working capital required him to agree to compromise $6,500.00 in accounts receivable for $4,000.00. No testimony was presented, however, about Dubin's average return[3] on accounts receivable so that it is difficult to assess the degree to which Dubin was injured by the compromise. I find that Dubin lost approximately $1,500.00 by compromising accounts receivable on a emergency basis and that such amount is an appropriate measure of compensatory damages.

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3. Similarly, no testimony was offered as to the present value of the accounts receivable on the date on which they were collected.

Appendix C

25. Dubin was precluded from using the approximately $4,500.00 in his bank account during the period of Jakobowski's violation of the automatic stay. However, no evidence was offered indicating that Dubin did not receive interest on the account for any period or that he was otherwise injured by loss of the use of money.

26. As of the date of trial in this case, Dubin's attorney fees and costs could not be fully computed. Consequently, I will allow Dubin 15 days to file a motion in conformity with the standards set forth in *In re Fine Paper Litigation*, 751 F.2d 562 (3rd Cir. 1984) and *In re Meade Land & Development Co.*, 527 F.2d 280 (3rd Cir. 1975) for attorney's fees and costs.

27. Because attorneys fees and costs in this case will amount to a significant sum, an additional award of punitive damages is unnecessary to deter Jakobowski from future misconduct and to punish him for his conduct in this case.

28. Dubin failed to establish that Jakobowski was in contempt of a court order other than the automatic stay insofar as an appeal of the order in question was taken and a stay pending appeal was entered. Upon resolution of the appeal unfavorably to Jakobowski, he took the steps required to dissolve the writ. Failure to notify Dubin or this court of dissolution of the writ is not itself actionable as contempt of the court order where the order by its terms did not require notice.

CONCLUSIONS OF LAW

1. This court has jurisdiction over this adversary proceeding as a core matter pursuant to 28 U.S.C. §157(b)(2)(A) insofar as

it relates to enforcement of the automatic stay and orders duly entered by this court.[4]

2. Jakobowski deliberately and willfully violated the automatic stay by failing to dissolve the writ of execution on Dubin's business bank account after February 27, 1987, and by filing a state court pleading in aid of execution with knowledge of the existence of the stay. Jakobowski's conduct constituted civil contempt.

3. For deliberate and willful violations of the automatic stay constituting civil contempt, compensatory damages as well as costs and attorneys fees are appropriate relief, even absent the operation of 11 U.S.C. §362(h). This court has the power subject to Bankr. Rule 9020 to remedy civil contempt.

4. Dubin established compensatory damages in the total amount of $2,550.00.

5. Dubin is entitled to judgment against Jakobowski in the amount of $2,550.00 plus attorneys fees and costs.

6. Dubin failed to establish that Jakobowski was in contempt of a court order.

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4. Judge Fullam has held, in affirming Judge Goldhaber's order of April 26, 1984 that this is a core proceeding. *Dubin v. Jakobowski*, C.A. No. 84-3022, Memorandum and Order (E.D. Pa. February 8, 1985). That holding constitutes law of the case. *See e.g. Hayman Cash Register Co. v. Sarokin*, 669 F.2d at 162 (3rd Cir. 1982). Moreover, at least one court of appeals has explicitly held that a proceeding "to prosecute a violation of the automatic stay" is a core proceeding. *Budget Service Co. v. Better Homes of Virginia*, 804 F.2d 289 (4th Cir. 1986).

Appendix C

DISCUSSION

This case requires me to resolve several issues related to liability for violations of the automatic stay arising prior to passage of 11 U.S.C. §362(h). Because I do find the defendant liable, I must also resolve certain issues involving my power to grant relief to the debtor.

Much of the applicable law on the issue of liability was set out in my prior opinion in this case which resolved defendant's motion to dismiss.

> Actions by creditors to collect a debt from the debtor, taken after the filing of a bankruptcy petition, are null and void and of no legal effect. *See, e.g. Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982); *In re Eisenberg*, 7 B.R. 683 (Bankr. E.D.N.Y. 1980). These actions are invalid even though the creditor had no notice of the bankruptcy filing. *In re Miller*, 22 B.R. 479 (D. Md. 1982); *In re Dennis*, 14 B.R. 125 (Bankr. E.D. Pa. 1981); *In re Eisenberg*. The lack of notice on the part of the creditor means only that his action was not willful and therefore not contemptuous. *See Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093, 97 S. Ct. 1107, 51 L. Ed. 2d 540 (1977); *In re O'Connor*, 42 B.R. 390 (Bankr. E.D. Ark. 1984); *Matter of Endres*, 12 B.R. 404 (Bankr. E.D. Wis. 1981).

Appendix C

> Once a creditor has been notified of the bankruptcy filing, the creditor has a duty to restore the status quo; that is, the creditor activities without the debtor having to seek affirmative relief from bankruptcy court. *In re Miller; In re Lowry*, 25 B.R. 52 (Bankr. E.D. Miss. 1982); *In re Elder*, 12 B.R. 491 (Bankr. M.D. Ga. 1981); *Matter of Endress. See also In re Conti*, 42 B.R. 122 (Bankr. E.D. Va. 1984).
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> * * *
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> The failure of the creditor or the creditor's attorney to abide by the obligation imposed by orders of this court or by the requirements of §362(a) entitles the debtor to provable compensatory damages. *Matter of Carter*, 691 F.2d 390 (8th Cir. 1982); *Borg-Warner Acceptance Corp. v. Hall; In re Miller; see In re Demp*, 23 B.R. 239 (Bankr. E.D. Pa. 1982); *In re Walker*, 7 B.R. 216 (Bankr. R.I. 1980). *See also In re Damon*, 40 B.R. 367 (Bankr. S.D.N.Y. 1984).

In re Stephen W. Grosse, P.C., 68 B.R. 847, 850-51 (Bankr. E.D. Pa. 1987) (footnotes omitted). *See also In re Ward*, 837 F.2d 124 (3rd Cir. 1988) (foreclosure sale held without knowledge of automatic stay "was void and without effect").

Because the alleged violation of the stay arose prior to the effective date of 11 U.S.C. § 362(h),[5] I must consider the standard

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5. 11 U.S.C. §362(h) provides:

(Cont'd)

for liability in the absence of statutory guidance. In *In re Wagner*, 74 B.R. 898, 902 (Bankr. E.D. Pa. 1987), I concluded:

> Prior to the enactment of 11 U.S.C. 5362(h), parties aggrieved by a violation of the automatic stay ordinarily invoked the remedy of civil contempt. *See* Kennedy, *The Automatic Stay in Bankruptcy*, 11 U.Mich.J.L.Reform, 177, 259-66 (1977). In order for a party to be held in civil contempt, a court must find that the party violated a specific and definite court order and that the party had knowledge of the order sufficient to put him on notice of the proscribed conduct. *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093, 97 S. Ct. 1107, 51 L. Ed. 2d 540 (1977); *Mercer v. D.E.F., Inc.*, 48 B.R. 562 (Bankr. D. Minn. 1985); *In re Damon*, 40 B.R. 367 (Bankr. S.D.N.Y. 1984); *Matter of DePoy*, 29 B.R. 466 (Bankr. N.D. Ind. 1983); *In re Demp*, 23 B.R. 239 (Bankr. E.D. Pa. 1982). *See also Kellogg v. Chester*, 71 B.R. 36, 38 (N.D. Tex. 1987) (level of knowledge for finding of civil contempt is "not high" and good faith is irrelevant).

Thus, the automatic stay, 11 U.S.C. §362(a), constitutes an injunction with the force of an order of this court, knowing

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(Cont'd)

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys fees and in appropriate circumstances, may recover punitive damages.

violation of which gives rise to the remedy of civil contempt.[6]

In the proceeding at bench it is undisputed that neither Jakobowski nor Wolk, his client, was informed of the bankruptcy petition at time of filing. Similarly, neither Jakobowski nor Wolk had knowledge of the bankruptcy when Dubin's account was garnished. However, both Wolk and Jakobowski were given notice of the bankruptcy one week later, on January 30, 1987.

Knowledge of the bankruptcy filing has been held to constitute the legal equivalent of knowledge of the automatic stay. *See In re Zartun*, 30 B.R. 543 (Bankr. 9th Cir. 1983); *In re Wagner. See also In re Bragg*, 56 B.R. 46 (Bankr. M.D. Ala. 1985).

As of that date, Wolk was under an affirmative obligation to dissolve the writ. *In re Stephen W. Grosse, P.C.*, 68 B.R. at 850; *In re Miller*, 22 B.R. 479 (D. Md. 1982); *In re Lowry*, 25 B.R. 52 (Bankr. E.D. Miss. 1982). Here, that obligation was made even clearer to Wolk when he was held in contempt by Judge Goldhaber on February 27, 1984, and ordered to pay *in terrorem* damages for each day past March 2, 1984 until the writ was dissolved. Jakobowski denies, however, that Wolk ever affirmatively asked him to dissolve the writ, although he admits Wolk informed him of the order of February 27, 1984.

Jakobowski essentially argues that because Wolk never asked him to dissolve the writ and because Jakobowski was not Wolk's bankruptcy counsel, he did not violate the stay. I find these arguments disingenuous. It strains credibility to assert that Wolk did not request that Jakobowski dissolve the writ in the face of court order requiring him to do so or pay $200.00 daily damages

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6. Even if this case had arisen after passage of 11 U.S.C. §362(h), the civil contempt remedy would still be viable. *See Wagner*, 74 B.R. at 902-903.

for contempt.[7] Moreover, Jakobowski testified that he alone, as Wolk's attorney in the execution proceeding, could dissolve the writ and that he was aware of the order holding Wolk in contempt. He was thus aware of this court's mandate that the writ be dissolved and admittedly he was the only one who could do so. As of the date that he became aware of the court's order of February 27, 1987, it was abundantly clear to Jakobowski not only that the existence of the writ violated the automatic stay, but also that he had an affirmative obligation to undo the writ and thus release funds which had become property of the bankruptcy estate. Failure to act under such circumstances constitutes proscribed conduct giving rise to the civil contempt remedy. *In re Miller; Matter of Behm*, 44 B.R. 811 (Bankr. W.D. Wis. 1984); *In re Lowry; In re Elder*, 12 B.R. 491 (Bankr. M.D. Ga. 1981).[8] *See also In re Aponte*, Bankr. No. 85-03157T, Adv. No. 85-0844 slip op. (Bankr. E.D. Pa. 1988). Jakobowski is not insulated from civil contempt for violating the automatic stay because he was the attorney for the creditor rather than the creditor himself. *In re Rhyne*, 59 B.R. 276 (Bankr. E.D. Pa. 1986); *In re Demp*, 23 B.R. 239 (Bankr. E.D. Pa. 1982).

Jakobowski's position is even more transparent in light of

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7. I place no reliance, however, on the hearsay declarations of Wolk contained in his letter to the court of March 1, 1984.

8. Because I find that the damages suffered by Dubin accrued regardless of the date on which Jakobowski first became liable for civil contempt, I do not pass on whether Jakobowski was in contempt as of January 30, 1984, when Dubin's attorney first informed him of the bankruptcy, but before there was an express court mandate requiring dissolution of the writ. I note, however, that *Miller*, *Lowry* and *Elder* suggest that a creditor is liable for failure to restore the status quo upon learning of a debtor's bankruptcy filing even before the court mandates that the creditor act.

his conduct subsequent to February 27, 1984. Nor only did he fail to dissolve the writ, but, in fact, he filed an affirmative pleading in state court seeking supplementary relief in aid of execution. Jakobowski cannot and does not attempt to argue that he was without knowledge of the automatic stay when that pleading was tiled. Even assuming *arguendo* that inaction is not cognizable as civil contempt for violating the automatic stay, Jakobowski unquestionably took affirmative action which violated the stay.

In short, Jakobowski's conduct, at least from February 27, 1985, was a violation of the stay constituting civil contempt. As I stated in *Wagner* 74 B.R. et 902

> [U]pon a finding of civil contempt, a court may impose a fine or *in terrorem* damages in order to coerce compliance with its orders; it may also award damages to compensate the aggrieved party for any actual loss suffered as well as attorney's fees and costs.

See also e.g., McDonald's Corp. v. Victory Investments, 727 F.2d 82 (3rd Cir. 1984); *CBS Inc. v. Pennsylvania Record Outlet, Inc.;* 598 F.Supp. 1549 (W.D. Pa. 1984).

At least since the Supreme Court's decision in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), however, a bankruptcy judge's power to find civil contempt has been hotly debated. *See generally In re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987); *In re Haddad*, 68 B.R. 944 (Bankr. D. Mass. 1987). Prior to passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), bankruptcy judges were impliedly granted civil contempt powers coextensive with those of Article III courts. *In re Sequoia Auto Brokers*, 827 F.2d at 1287. That grant of power may or may not

have been constitutional. *Compare e.g., In re Johns Manville Corp.*, 26 B.R. 919 (Bankr. S.D.N.Y. 1983) (bankruptcy court's contempt power survives Marathon) *with In re Omega Equipment Corp.*, 51 B.R. 569 (D.D.C. 1985) (constitution mandates that contempt proceedings not be finally determined in bankruptcy court). *See In re Haddad*, 68 B.R. at 946-47.

It is clear, however, that the statutory underpinning for the perceived broad grant of civil contempt power to bankruptcy judges was repealed by Congress in enacting BAFJA.[9] *See In re Seguoia Auto Brokers*, 827 F.2d at 1288. Since that time, courts have generally looked to 11 U.S.C. §105 as the statutory basis for the civil contempt power of bankruptcy judges. As originally promulgated in 1978, 11 U.S.C. §105(a) provided:

> The Bankruptcy Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.

In enacting BAFJA congress amended section 105(a) to change "Bankruptcy Court" to "Court." Thus, the debate after BAFJA, not only centered upon the constitutionality of a grant of civil contempt power to bankruptcy judges, but also upon whether the text of section 105 could provide the statutory basis for such power. *Compare e.g., In re Better Homes of Virginia, Inc.*, 52 B.R. 426 (E.D. Va. 1985) *aff'd on other grounds*, 804 F.2d 289

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9. Although it would be unfair to apply a new remedy such as that found in 11 U.S.C. §362(h) to Mr. Jakobowski because it was not in effect at the time his violation of the stay occurred, I perceive no unfairness in applying a civil contempt remedy grounded upon the current version of §105(a) when a different but perhaps unconstitutional basis for the same remedy was in effect at the time the violation occurred. *See Matter of Reynolds*, 726 F.2d 1420 (9th Cir. 1984). *See generally, Bradley v School Board of Richmond*, 416 U.S. 696 (1974).

(4th Cir. 1986) *with In re Industrial Tool Distributors, Inc.*, 55 B.R. 746 (N.D. Ga. 1985). *See also In re Sequoia Auto Brokers, Ltd.*, 827 F.2d at 1290.

Recently, however, the terms and basis of the debate have been altered once again. In 1986, Congress amended 11 U.S.C. § 105(a) to read as follows:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent any abuse of process.

This amendment makes clear that Congress meant section 105 to serve as the statutory basis for the civil contempt power of bankruptcy judges. *In re Haddad*, 68 B.R. at 948:

> The second sentence, which was added to § 105(a) by the 1986 Amendments, puts to an end any question as to whether Congress intends the first sentence to invest bankruptcy courts with the power to enforce their own orders. If they can do so *sua sponte*, they certainly can act, as here, upon the motion of a party. Nor can there be any doubt that the reference in § 105(a) to "court" includes a bankruptcy judge. The present bankruptcy case and the underlying adversary proceeding have been referred to this Court by the district court under

a general reference, pursuant to 28 U.S.C. § 157. The adversary proceeding, in which the Trustee sought possession of the debtor's home, is a core proceeding which bankruptcy judges may adjudicate, 28 U.S.C. § 157(b)(2)(E). The referral of jurisdiction to adjudicate core proceedings includes the jurisdiction to adjudicate civil contempt arising within the core proceeding. *Tele-Wire Supply Corp. v. Presidential Financial Corp. (In re Industrial Tool Distributors, Inc.)*, 55 B.R. 746, 748-49 (N.D. Ga. 1985). This is confirmed by 11 U.S.C. § 105(c), added by the 1984 Amendments, which requires reference to the powers of bankruptcy judges under U.S.C. Title 28 for a determination of the extent to which they may exercise powers conferred upon the "court" in title 11. Perhaps most significant, at the time of the passage of the 1986 Amendments, all eleven circuits had adopted a local rule or order referring all cases and proceedings to the bankruptcy judges for their districts. Congress, therefore, must be held to an understanding that the grant of contempt powers to the "court" under the 1986 Amendments was in effect a grant of such powers to bankruptcy judges in core proceedings. In fact, in the only mention of the amendment to § 105(a) in the legislative history to the 1986 Amendments, Sen. Orrin Hatch expressed an understanding that: "[the amendment] allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner." 132 CONG. REC.S5092

(daily ed. Oct. 3, 1986) (statement of Sen. Hatch) (emphasis added).

Accord Kellogg v. Chester, 71 B.R. 36 (N.D. Tex. 1987).[10] *Cf. In re Daily Corp.*, 72 B.R. 489 (Bankr. E.D. Pa. 1987) (§ 105(a) as amended gives a *bankruptcy* judge the power to dismiss a chapter 11 case *sua sponte*.).

As discussed in *Haddad*, however, the existence of statutory authority to remedy civil contempt does not resolve the question of whether the provision for such authority is constitutional. *In re Haddad*, 68 B.R. at 949: "The question remains: may bankruptcy courts validly exercise [civil contempt] powers under the separation of powers doctrine embodied in Article III of the constitution." *Compare e.g., Kellog v. Chester*, 71 B.R. 36 (N.D. Tex. 1987) (contempt power may be constitutionally granted to bankruptcy judges) *with In re Continental Air Lines*, 61 B.R. 758 (S.D. Tex. 1986) (such power is not consistent with the constitution). *Cf. U.S. v. Revie*, 834 F.2d 1198 (5th Cir. 1987) (after noting uncertainly in the law, court finds that bankruptcy judges may at least hear contempt proceedings whether or not they can enter binding decisions).

Recently amended Bankr. Rule 9020 provides:

> (a) *Contempt Committed in Presence of Bankruptcy Judge.* Contempt committed in the presence of a bankruptcy judge may be determined

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10. It is not clear whether the Ninth Circuit Court of Appeals considered the 1986 amendment to 11 U.S.C. § 105(a) in concluding that there is no statutory authority for bankruptcy courts to exercise the civil contempt power. *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281, at 1289-90.

summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(b) *Other Contempt.* Contempt committed in a case or proceeding pending before a bankuptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on applicaton of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrepect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(c) *Service and Effective Date of Order; Review.* The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files with the clerk objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order

shall be reviewed as provided in Rule 9033.

(d) *Right to Jury Trial.* Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

The 1987 amendment added subsection (c) and made the rule applicable to both civil and criminal contempt. Subsection (c) permits an entity found in contempt to object to a bankruptcy judge's contempt order. If such objections are filed within 10 days, the objecting party is entitled to review *de novo* by the district court pursuant to Bankr. Rule 9033(d). This procedure is analagous but not identical[11] to the procedure for district court review of

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11. As stated in 9 *Collier on Bankruptcy* ¶9020.06 at 9020-10 (15th ed. 1988) Bankr. Rule 9020:

> This subdivison takes no position with respect to whether a contempt matter is core or non-core, but leaves it up to the potential contemnor to decide how it should be treated. If the order entered by the bankruptcy judge is not objected to by the contemnor, the order is treated as final, "and shall have the same force and effect as an order of contempt entered by the district court . . ." However, if the contemnor files objections, which are to be prepared in the manner provided in Rule 9033(b), then there is a hearing *de novo* as provided in Rule 9033.
>
> If the contemnor does not file objections within the Rule 9033 time period, apparently that inaction will be deemed to be consent to the power or jurisdiction of a bankruptcy judge to enter an order of contempt. Having foregone the ability to have the matter ultimately determined by an Article III district court judge, the contemnor could hardly be heard on appeal to contend that the bankruptcy judge was without

(Cont'd)

bankruptcy court determinations in non-core matters pursuant to 28 U.S.C. § 157(c)(1) which has been held constitutional by numerous courts. *See e.g., In re Production Steel Inc.*, 48 B.R. 841 (M.D. Tenn. 1985); *In re Tom Carter Enterprises, Inc.*, 44 B.R. 605 (C.D. Cal. 1984); *In re WWG Industries*, 44 B.R. 287 (N.D. Ga. 1984); *In re Earle Industries, Inc.*, 71 B.R. 919 (Bankr. E.D. Pa. 1987). *See also United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406 (1980) (upholding constitutionality of provision under which magistrates make recommendations on certain motions in criminal matters subject to objection and district court review *de novo*.)

Because Rule 9020[12] provides for objections to civil contempt determinations and district court review *de novo*, I conclude that civil contempt orders entered subject to the rule by a bankruptcy judge are constitutional.[13] Accord, In re Miller, 81 B.R. 669

(Cont'd)

> the power to enter such an order. If, on the other hand, the contemnor desires the matter to be heard by a district court judge, the contemnor has the power to do so by following the procedures set out in subdivision (c) of Rule 9020.

12. The order of the United States Supreme Court which authorized transmittal of the 1987 Amendments to the Bankruptcy Rules to Congress provides that the amended rules, including amended Rule 9020 "shall govern . . . insofar as just and practicable all proceedings in bankruptcy cases" pending as of August 1, 1987. I conclude that amended rule 9020 is applicable to this case.

13. Congress expressly provided for bankruptcy court enforcement of the automatic stay in 11 U.S.C. § 362(h). At least one court of appeals has found that a proceeding under 362(h) for violation of the stay is constitutional. *See Budget Service Co. v. Better Homes of Virginia*, 804 F.2d 289 (4th Cir. 1986). Although section 362(h) is not applicable to this proceeding because it arose

(Cont'd)

(Bankr. M.D. Fla. 1988). *See also In re Barbour*, 77 B.R. 530 (Bankr. E.D.N.C. 1987); *Kellogg v. Chester*, 71 B.R. at 39.

In the case at bench, I conclude that Dubin proved compensatory damages in the amount of $2,550.00.[14] Additionally he is entitled to attorneys fees and costs expended in prosecuting this matter to vindicate his rights under the stay.

Dubin, however, also seeks punitive damages. I note that there is a significant body of case law which concludes that I am without the power to award punitive damages as part of a remedy for civil contempt. *See e.g., In re Zartun*, 30 B.R. 543 (Bankr. 9th Cir. 1983); *In re Promower, Inc.*, 56 B.R. 619 (Bankr. D. Md. 1986) *aff'd*. 74 B.R. 49 (1987); *Matter of Deoew*, 51 B.R. 1010 (Bankr. E.D. Tenn. 1985); *Matter of DePoy*, 29 B.R. 471 (Bankr. N.D. Ind. 1983) These courts express concern that punitive damages would render an otherwise civil contempt remedy one for criminal contempt and that bankruptcy judges are without power to find criminal contempt. That a determination of criminal contempt is inherent in an award of punitive damages is consistent with the distinction between civil and criminal contempt. *See McDonald's Corp. v. Victory Investments, Inc., CBS Inc. v. Pennsylvania Record Outlet, Inc. Accord e.g., Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392 (5th Cir.

(Cont'd)
prior to the enactment of 362(h) in 1984, I have previously held that Congress intended section 362(h) to coexist with the civil contempt remedy for violations of the stay. *In re Wagner*, 74 B.R. at 902-903.

14. Only damages proved with reasonable certainty were awarded. *See Curtis T. Bedwell and Sons, Inc. v. International Fidelity Insurance Co.*, Nos. 86-1598, 86-1624, 86-1630 slip op. at 16, n.13 (3rd Cir. March 31, 1988).

1987).[15] I note that current Bankr. Rule 9020 does not distinguish between civil and criminal contempt and thus appears to allow bankruptcy judges to find criminal contempt subject to a potential trial *de novo*.

I need not, however, reach the issue of whether I have power to award punitive damages for contempt in the case at bench. Attorneys fees and costs in this case are likely to constitute a significant sum.[16] Under these circumstances, the award of attorneys fees and costs will be sufficient to deter Jakobowski from future violations of the automatic stay and to punish him for his conduct in this case. I thus conclude that punitive damages are unnecessary. *See In re Advance Press & Litho, Inc.*, 46 B.R. 700 (D. Colo. 1984).

An appropriate order will be entered.

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15. As I stated in *Wagner* at 903 n.11:

> [i]f nothing else, Section 362(h) lays to rest any doubt about the bankruptcy court's power to award punitive damages for a willful violation of the stay.

16. Although I will provide Dubin with an additional 15 days to move for fees and costs, I note that evidence presented at trial suggests that Dubin's legal fees and costs may already exceed $14,000.00 for this matter. Of course, Jakobowski will have an opportunity to respond to any evidence or records submitted by Dubin in support of a motion for fees and such motion will be carefully reviewed.

Appendix C

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLANIA DATED APRIL 8, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chapter 7
Bankruptcy No. 83-01694G

In re
STEPHEN W. GROSSE, P.C. t/a MARTIN GORMAN DENTAL PAVILION, GERMANTOWN DENTAL PAVILION, DENTAL PAVILION DENTAL DIMENSIONS, DENTAL DIMENSIONS SOUTH STREET PROF BLDG., ASSOCIATED DENTAL GROUP, LTD., BARRY A. DUBIN, DDS AND ASSOC., STEPHEN W. GROSSE, P.C. DENTAL PAVILION, GERMANTOWN DENTAL, GIRARD DENTAL, MARKET STREET DENTAL PAVILION, MARKET DENTAL

Jointly Administered with

Bankruptcy No. 83-01693
Bankruptcy No. 83-01695
Bankruptcy No. 83-01696

Debtors

Adversary No. 84-0297G

BARRY A. DUBIN

Plaintiff

v.

FRANK A. JAKOBOWSKI, ESQUIRE

Defendant

Appendix C

ORDER

AND NOW, this 8 day of April, 1988, upon consideration,

it is hereby ORDERED that the Chief Deputy Clerk in charge of Bankruptcy Operations shall enter judgment in favor of plaintiff and against defendant in the amount of $2,550.00.[1] It is further ORDERED that plaintiff shall have 15 days from the date of this order to move for attorneys fees and costs.

s/Bruce Fox
BRUCE FOX
United States Bankruptcy Judge

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1. This order is subject to the provisions of Bankr. Rule 9020(c).

Appendix C

STEPHEN W. GROSSE, P.C.
ET AL

Chapter 7
Bankruptcy No. 83-01694G
Adversary No. 84-0297G

Copies of the Bankruptcy Judge's Opinion and Order dated April 8, 1988, mailed on said date to the following:

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Counsel for the defendant
Frank Jakobowski

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Defendant

Appendix C

APPENDIX C — MEMORANDUM OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chapter 7
Bankruptcy No. 83-01694G

In re
STEPHEN W. GROSSE, P.C. t/a MARTIN GORMAN DENTAL PAVILION, GERMANTOWN DENTAL PAVILION, DENTAL PAVILION DENTAL DIMENSIONS, DENTAL DIMENSIONS SOUTH STREET PROF BLDG., ASSOCIATED DENTAL GROUP, LTD., BARRY A. DUBIN, DDS AND ASSOC., STEPHEN W. GROSSE, P.C. DENTAL PAVILION, GERMANTOWN DENTAL, GIRARD DENTAL, MARKET STREET DENTAL PAVILION, MARKET DENTAL

Jointly Administered with

Bankruptcy No. 83-01693
Bankruptcy No. 83-01695
Bankruptcy No. 83-01696

Debtors

Adversary No. 84-0297G

BARRY A. DUBIN

Plaintiff

v.

FRANK A. JAKOBOWSKI, ESQUIRE

Defendant

Appendix C

MEMORANDUM

By BRUCE FOX, Bankruptcy Judge:

As an outgrowth of my order of April 8, 1988, which granted plaintiff judgment of $2,550.00, the plaintiff has now moved for an award of counsel fees and costs in the amount of $20,610.00 and $361.00 respectively. Defendant contends that no fees and costs should be awarded, and, alternatively, that the sums sought are excessive. After a hearing on this matter, I conclude that the plaintiff's application should be granted in large part.

I.

Before turning to the application itself, I shall consider a procedural issue raised orally by defendant at the hearing. After the entry of the April 8 order, defendant filed a timely appeal and now suggests that the pendency of the appeal preven suggested that a fair reading of *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982) would not divest this bankruptcy court of the authority to rule upon counsel's fee request. The Supreme Court just recently supported this interpretation of *White* and held in *Budinich v. Becton Dickinson & Co.*, ____ U.S. ____ , 108 S. Ct. 1717, 1721 (May 23, 1988):

> As a general matter, at least, we think it indisputable that a claim for attorneys fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action.

(footnotes omitted). Thus, this fee request is collateral to the

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judgment entered against defendant and the pendency of an appeal does not divest bankruptcy court of jurisdiction. *See also Napier v. Thirty or More Unidentified Federal Agents*, Nos. 87-5394 87-5511, *slip op.* (3d Cir. August 31, 1988); *West v. Keve*, 721 F.2d 91 (3d Cir. 1983); *Jungkurth v. Eastern Financial Service, Inc.*, C.A. 87-5888, *slip op.* (E.D. Pa., June 16, 1988) (Green, J.).

II.

As to the merits of the application, defendant takes the position that no fees should be awarded. He argues:

> Counsel's actions were completely unnecessary. The entire matter could have been resolved with a minor uncontested motion to strike the writ of execution and would have involved no greater than two hours of time.

Defendant's Answer, ¶ 4.

Unfortunately, I cannot agree with defendant's argument. This *should* have been a minor matter; plaintiff was simply requesting that defendant, as counsel to a creditor, remove a postpetition attachment lien placed against property of the bankruptcy estate. Whether the creditor knew of the bankruptcy at the time of the attachment was irrelevant to the question of its validity. *See Kalb v. Feuerstein*, 308 U.S. 433 (1940); *In re Ward*, 837 F.2d 124 (3d Cir. 1988). The defendant, though, refused to release the lien and consistently took the misguided positions that the absence of knowledge of the bankruptcy validated his actions, and that any litigation regarding his client's lien take place only in state court. As a direct result, what should have been a minor matter mushroomed logarithmicaily: the debtor requested

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damages in addition to injunctive relief; multiple hearings in this court were needed simply to set aside the lien; two motions to dismiss were filed by defendant, (in addition to other various pretrial motions); at least two appeals have been taken; the trial on the merits took place over a two day period; a motion was filed by the defendant in state court after he knew of the bankruptcy filing in an attempt to circumvent the jurisdiction of this court, which required a response from the debtor; and, due in part to adjournment requests sought largely by defendant, it has taken four years to bring this matter to a resolution in this bankruptcy court. Thus, this "minor" matter has been so vigorously contested by defendant that it no longer is minor. It is disingenuous at best for defendant to now protest that plaintiff's counsel has devoted more time to the dispute than was required. *See Crossley v. Lieberman*, C.A. #88-0084, *slip op.* at 421 (E.D. Pa., July 13, 1988 Van Antwerpen, J.).[1]

Having concluded that the award of counsel fees is appropriate, I must review the fee application in accordance with the lodestar formula established in *Lindy Brother Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*) *appeal after remand* 540

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1. To the extent that defendant suggests that an award of counsel fees against a party who both violates the stay provisions of 11 U.S.C. § 362(a) and various orders of this court is inappropriate, I again disagree. As I noted when I denied defendant's second motion to dismiss, counsel fees are often awarded in such circumstances. *In re Stephen W. Grosse, P.C.*, 68 B.R. 847, 851 (Bankr. E.D. Pa. 1987). *See Matter of Carter*, 691 F.2d 390 (8th Cir. 1982); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982); *In re Rhyne*, 59 B.R. 276 (Bankr. E.D. Pa. 1986). Indeed, it was on this basis that I deferred ruling upon plaintiff's motion for sanctions under the bankruptcy version of Rule 11. 68 B.R. at 851.

F.2d 102 (3d Cir. 1976) (*Lindy II*). *See Carpenters Health and Welfare Fund v. Ken R. Ambrose, Inc.*, 727 F.2d 279, 284-285 (3d Cir. 1983); *Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985).

The first element of the lodestar is to determine the number of hours of service reasonably necessary. Defendant argues that certain of the services provided by various counsel were duplicative, and that the time spent on some tasks was excessive. After a careful review of plaintiff's request and accompanying submissions, I agree that the number of hours for which compensation is sought must be reduced. *See Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977) (*Prandini I*).

The question of duplicativeness comes from the involvement of two experienced counsel in this matter. One attorney, Myron A. Bloom, was involved from the outset and alleges that he has devoted 71 hours of time to this adversary proceeding. The other, Steven D. Usdin, avers that he spent 52.2 hours on this adversary matter. I accept as valid counsel's explanation that Mr. Usdin became involved as trial counsel when it became apparent that Mr. Bloom would testify at trial as a fact witness. Counsel suggested that the need for new trial counsel became apparent on or about September 23, 1986. Yet, defendant correctly notes that Mr. Usdin spent time beginning as early as August 20, 1986. For example two time entries for Mr. Usdin dated September 4, 1986 refer to legal research done in conjunction with attendance at a hearing on that date.

The September 4, 1986, transcript was introduced into evidence as Exhibit J-1. It does not reflect any appearance

whatsoever by Mr. Usdin[2] and so I shall disallow the 2 hours sought for his attendance at the hearing. I shall allow though the .6 hours of time spent from August 20, 1986 through August 28, 1986. Apparently Mr. Usdin was monitoring the case at this point because Mr. Bloom was on vacation. In addition, the research time spent on September 4, 1986, occurred because defendant sought a postponement to which plaintiff concurred. My predecessor, Chief Bankruptcy Judge Goldhaber, would not approve another postponement and specially listed the matter for trial at 2:00 P.M. that same day.[3] Apparently, Mr. Bloom hurriedly red for trial and called upon Mr. Usdin to assist him. In light of this unexpected turn of events, I do not find Mr. Usdin's time spent on September 4 as duplicative or unreasonable.

After September 23, 1986 there is some duplication of effort between Mr. Bloom and Mr. Usdin. As Mr. Usdin was then trial counsel, I make the following reductions in Mr. Bloom's time:

9/26/86	disallow 3.5 hours, as Mr. Usdin was then trial counsel, Mr. Bloom had just spent previously 3.9 hours on 9/4 preparing for trial, and this hearing also took less than one hour.
9/30/88	disallow .2 hours as admittedly duplicative.

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2. *Compare* Exhibit J-2, the September 29, 1986, hearing at which both Mr. Usdin and Mr. Bloom entered their appearances.

3. The transcript reflects that after one hour, a frustrated court granted a postponement in order to allow defendant another opportunity to obtain representation. Exhibit J-1. Since that hearing took only one hour, Mr. Bloom's listing on 9/4/86 that 2.5 hours were spent at the hearing is excessive. Assuming .5 hours of travel time, I shall disallow one hour.

Appendix C

10/24/86	disallow .2 hours. Mr. Usdin on 10/25 took .3 hours to review the same opinion.
6/26/87	disallow .2 hours as Mr. Usdin was then responding to discovery.
6/25/87	disallow .2 hours. Mr. Usdin was handling the appeal.

Of Mr. Usdin's time, I consider excessive the following:

9/29/86	reduce by 2.0 hours for preparing a motion for a protective order. The motion was based solely upon the premise that the discovery was sought on the eve of trial. Experienced counsel should be able to complete this task in 2.5 hours.
9/29/86	reduce by 1 hour the time spent at the hearing, as the hearing itself took only 1 hour, and was the only matter listed.
11/26/86	reduce by 1.5 hours the time spent at a court hearing on defendant's second motion to dismiss. This hearing was not as lengthy as claimed.

In sum, I view 5.3 hours of Mr. Bloom's time as duplicative and

6.5 hours of Mr. Usdin's time as excessive or duplicative.

Finally, I also acknowledge the instruction from the Court of Appeals that "there must be a correlation between the 'hours worked' and the 'total recovery.' When monetary damages are awarded, the trial court must consider the relationship between the fee award and the amount of recovery. This consideration should be made both in the context of determining the lodestar and in determining whether to adjust the fee upward or downward." *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983). The time spent by Mr. Bloom and his associate Mr. Packel prior to January 9, 1987, (the date I denied defendant's second motion to dismiss), was concerned with obtaining injunctive relief and responding to defendant's motions and appeals. As I noted earlier, the large time expenditure was caused by defendant's actions, and he cannot now complain that unnecessary time was spent.

Subsequent to January 9, 1987, plaintiff's counsel Mr. Usdin and legal assistant Jeffrey Cooper devoted approximately $4,400.00 of time to recover $2,550.00 in damages. A downward adjustment of $1,000.00 to reflect this modest result is appropriate.

III.

The second element of the lodestar is a determination of the appropriate hourly rate. Generally, this rate should reflect the "market value" of the attorney's time which is usually expressed as the attorney's normal billing rate. *See Pawlak v. Greenawalt*, 713 F.2d 972 (3d Cir 1983). This billing rate, though, must be considered in relation to "that which has been historically charged in the community." *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir. 1987). Furthermore, the hourly rate must be correlated

to the tasks involved. As the Court of Appeals colorfully noted: "A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." *Ursic v. Bethlehem Mines,* 719 F.2d at 677.

Again, defendant complains, generally, that the billing rates charged by Mr. Usdin and Mr. Bloom are excessive. Both attorneys have considerable experience (approximately ten years for Usdin and fifteen for Bloom) and for the most part the rates sought are not unreasonable. Mr. Bloom's rate of $185/hour for work done in 1987, however, does seem high, as virtually all of his time was spent as a witness at trial. An hourly rate of $150.00 for services as a witness is more appropriate than that sought by plaintiff. Mr. Usdin's hourly rate of $170.00 for 1987 will also be reduced to $160.00 to reflect both his experience and the nature of the trial, which was not particularly complex. In other respects the hourly rates are reasonable and will be allowed. Taking into account the reductions mentioned above, a compensable counsel fee will be allowed in the amount of $15,486.00.

Defendant's sole objection to the allowance of costs is that it is excessive to allow recovery of a duplication charge of 20 cents per page. I find this charge within the norm sought by other firms; *see, e.g., In re Mayflower Associates,* 78 B.R. 41, 52 (Bankr. E.D. Pa. 1987), and recoverable. *See generally* Bartell, *Taxation of Costs and Expenses in Federal Court,* 101 F.R.D. 517 (1984). Thus the requested $361.00 for reimbursement for costs and expenses will be allowed.

An appropriate order shall be entered.

Appendix C

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED SEPTEMBER 8, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chapter 7
Bankruptcy No. 83-01694G

In re

STEPHEN W. GROSSE, P.C. t/a MARTIN GORMAN DENTAL PAVILION, GERMANTOWN DENTAL PAVILION, DENTAL PAVILION DENTAL DIMENSIONS, DENTAL DIMENSIONS SOUTH STREET PROF. BLDG., ASSOCIATED DENTAL GROUP, LTD., BARRY A. DUBIN, DDS AND ASSOC., STEPHEN W. GROSSE, P.C. DENTAL PAVILION, GERMANTOWN DENTAL, GIRARD DENTAL, MARKET STREET DENTAL PAVILION, MARKET DENTAL

Jointly Administered with

Bankruptcy No. 83091693
Bankruptcy No. 83-01695
Bankruptcy No. 83-01696

Adversary No. 84-0297F

BARRY A. DUBIN

Plaintiff

v.

FRANK A. JAKOBOWSKI ESQUIRE

Defendant

Appendix C

ORDER

AND NOW, this 8 day of September, 1988, after hearing plaintiff's motion for attorneys fees and costs in this proceeding and defendant's objections thereto, and for the reasons set forth in the accompanying memorandum,

it is hereby ORDERED that the Chief Deputy Clerk in Charge of Bankruptcy Operations shall enter judgment in favor of the plaintiff and against the defendant in the total amount of $15,847.00, $15,480.00 representing attorneys fees and $361.00 resenting costs.

s/ Bruce Fox
BRUCE FOX
United States
Bankruptcy Judge

ENTERED 9/8/88

Appendix C

STEPHEN W. GROSSE, P.C. Chapter 7
Bankruptcy No. 83-01694G
Adversary No. 84-0297F

Copies of the Bankruptcy Judge's Memorandum and Order dated September 8, 1988, mailed on said date to the following:

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Matthew D'Annunzio, Esquire
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Counsel for the trustee,
Fred Zimmerman

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 8, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 84-3022

BARRY A. DUBIN,

Appellee

v.

FRANK A. JAKOBOWSKI, ESQ.,

Appellant

MEMORANDUM AND ORDER

FULLAM, J. FEBRUARY 8, 1985

This is an appeal from a bankruptcy judge's Order, entered April 26, 1984, directing the appellant, an attorney, to take immediate steps to dissolve an attachment of a bank account of the debtor.

The appellant, Frank M. Jakobowski, is attorney for Robert Wolk, trading as Wolk Dental Laboratory, a creditor of the debtor, who is a dentist named Barry A. Dubin. Before bankruptcy, Wolk, with Jakobowski's assistance, had obtained a judgment against the debtor, in the Court of Common Pleas of Philadelphia County (No. 1095 February Term 1982). On April

20, 1983, Dr. Dubin filed a petition in bankruptcy. The Wolk judgment was listed in the debtor's Amended Statement of Affairs but was inadvertently omitted from the A-3 schedule.

On January 23, 1984, notwithstanding the pending bankruptcy proceeding with its automatic stay, Jakobowski, on behalf of Wolk, issued execution on the judgment, and attached a bank account maintained by Dubin at Girard Bank. On January 30, 1984, counsel for the debtor formally notified Jakobowski's office of the pending bankruptcy proceeding and the automatic stay, and requested that the attachment be dissolved. The request was not complied with.

Counsel for the debtor thereupon filed a motion for an adjudication of contempt against Wolk. A hearing on this application was held on February 27, 1984. Wolk appeared at that hearing, unrepresented by counsel. The bankruptcy judge entered an order directing that Wolk be held in contempt, subject to a fine for each and every day beyond March 2, 1984, that the attachment remained in effect. The bankruptcy judge also ordered Wolk to direct his counsel, Jakobowski, to dissolve the writ of execution.

By letter dated March 1, 1984, Wolk informed the bankruptcy judge that he had directed Jakobowski to cause the attachment to be dissolved, but that Jakobowski refused to comply with that request.

The debtor thereupon brought an adversary proceeding against Jakobowski, by filing a complaint for injunctive and other relief on March 28, 1984. On March 30, 1984, the debtor filed a motion for preliminary injunction. A hearing on that motion was held April 26, 1984. The hearing was held on that date,

although Jakobowski did not appear. At the conclusion of the hearing, and after having waited a suitable interval for Jakobowski to appear, the bankruptcy judge entered the Order appealed from. Eventually, upon posting of a bond, the Order was stayed pending the outcome of this appeal.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 84-3022

BARRY A. DUBIN,

Appellee

v.

FRANK A. JAKOBOWSKI, ESQ.,

Appellant

ORDER

AND NOW, this 8th day of February, 1985, it is ORDERED that the April 26, 1984 Order granting injunctive relief against the defendant/appellant Frank A. Jakobowski, Esq. (correctly designated as Frank M. Jakobowski, Esq.) is AFFIRMED.

s/ John P. Fullam
J.

ENTERED: Filed February 12, 1985

APPENDIX E — RELEVANT STATUTES

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding

is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own

motion or on timely motion of any party, for cause shown. the district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 340, and amended Pub.L. 99-554, Title I, §§ 143, 144(b), Oct. 27, 1986, 100 Stat. 3096.)

11 U.S.C. §105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

Appendix E

(As amended Pub.L. 98-353, Title I, §118, July 10, 1984, 98 Stat. 344; Pub.L. 99-554, Title II, §203, Oct. 27, 1986, 100 Stat. 3097.)

No. 89-529

Supreme Court U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

FRANK A. JAKOBOWSKI, ESQUIRE,

Petitioner,

vs.

BARRY A. DUBIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant a Petition for a Writ of Certiorari to determine if, in 1984, a bankruptcy court, prior to the enactment of the Bankruptcy Amendment and Federal Judgeship Act of 1984, Pub. L. No. 98-353 (98 Stat. 333), was empowered to hold a person in contempt for a violation of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362.

LIST OF PARTIES TO THE PROCEEDING

Petitioner is Frank A. Jakobowski, Esquire.

Respondent is Barry A. Dubin.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statutes Involved 2

Statement of the Case 2

Summary of the Argument 7

Reasons for Denying the Writ 8

I. There is no conflict between Circuits, since the decision of the Court of Appeals for the Third Circuit that a bankruptcy court had (in 1984) legal authority to hold a person in civil contempt for a violation of the automatic stay provisions of the Bankruptcy Code, 11 U.S.C § 362, is consistent with the decisions of the Court of Appeals for the Ninth Circuit. . . . 8

II. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353 (98 Stat. 333) merely more carefully defined the inherent authority of a bankruptcy court to issue citations of contempt for violations of court orders. 14

Contents

Page

III. Any conflict which may, *arguendo,* have existed has been rendered moot by the 1987 Amendments to Bankruptcy Rule 9020 17

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Computer Communications, Inc. v. Codex Corporation (In re Computer Communications, Inc.), 824 F.2d 725 (9th Cir. 1987) 9, 10, 11

Gompers v. Bucks Store & Range Company, 221 U.S. 418 (1911) 12

Gonzales v. Parks, 830 F.2d 1033 (9th Cir. 1987) 11, 12

Layne & Bowler Corp. v. Western Wall Works, 261 U.S. 387 (1923) 13

McDonald's Corp. v. Victory Investments, 727 F.2d 83 (3d Cir. 1989) 12

Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) 15, 16, 17

Pastiras v. Idell (In re Sequoia Auto Brokers Ltd., Inc.), 827 F.2d 1281 (9th Cir. 1987) 8, 10, 11, 12, 13, 14, 17

Tele-Wire Supply Corp. v. Presidential Financial Corporation, Inc. (In re Industrial Tool Distributors, Inc.), 55 Bankr. 746 (Bankr. N.D. Ga. 1985) 12

Contents

Page

United States v. Abrams, 344 U.S. 855 (1952) 13

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 12

Wagner v. Piper Industries, Inc. (In re Wagner), 87 Bankr. 612 (Bankr. C.D. Cal. 1988) 10, 11, 12

Statutes Cited:

11 U.S.C. § 101 (1978) (amended 1984)..... 2

11 U.S.C. § 105 (1978) (amended 1984)..... 9

11 U.S.C. § 362 (1978) (amended 1984).....2, 11, 13, 14

11 U.S.C. § 362 (1984) 2, 4, 6, 7, 8, 9, 11, 13, 14

11 U.S.C. § 521 (1978) (amended 1984) 8, 9

11 U.S.C. § 524 (1984) 10

28 U.S.C. § 1471 (1978) (omitted 1984)..... 15

28 U.S.C. § 1481 (1978) (omitted 1984).....15, 17

Bankruptcy Act of 1898, Ch. 541 (30 Stat. 544), Section 41, 11 U.S.C. § 69 (repealed 1978) 14

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353 (98 Stat. 333).....7, 14

Contents

Page

Bankruptcy Reform Act of 1978, Pub. L. 95-598 (92 Stat. 2549) 7, 15

United States Constitution Cited:

Article I 15

Article I, Section 8, Clause 4 16

Article III 16

Rules Cited:

Bankruptcy Rule 920 (as enacted in 1978) 15

Bankruptcy Rule 9020 (as adopted in 1983) 2

Bankruptcy Rule 9020 (as amended in 1987) 2, 7, 10, 11, 13, 14, 17, 18, 19

Federal Rule of Appellate Procedure 38 6

Other Authorities Cited:

2 Collier on Bankruptcy, ¶ 362.12 (15th Ed. 1989) 11

Mr. Justice Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australian L.J. 108 (1959) 13

Contents

Page

APPENDIX

Appendix A — Opinion and Order of the United States District Court for the Eastern District of Pennnsylvania 1a

Appendix B -- Relevant Statutes 6a

11 U.S.C. § 362 (as enacted 1978) 6a

11 U.S.C. § 362 (as amended in 1984) 11a

Bankruptcy Rule 9020 (as adopted in 1983) 18a

Bankruptcy Rule 9020 (as amended in 1987) 20a

February 3, 1984, Dubin, by his counsel, filed a Motion for is not mandatory. 2 *Collier on Bankruptcy*, ¶ 362.12 (15th Ed. 1989).

Courts of Appeals for the Third and Ninth Circuits, but that the

No. 89-529

In The

Supreme Court of the United States

October Term, 1989

FRANK A. JAKOBOWSKI, ESQUIRE,

Petitioner,

vs.

BARRY A. DUBIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Barry A. Dubin, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the unpublished opinion in this case rendered June 29, 1989 by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion and Order of the United States District Court

for the Eastern District of Pennsylvania reproduced at Appendix 8a to 15a of the Petition for a Writ of Certiorari to the United States Court of Appeals to the Third Circuit is incomplete. The complete Opinion and Order is reproduced at Appendix A.

STATUTES INVOLVED

11 U.S.C. § 362 (as enacted in 1978), 11 U.S.C. § 362 (as amended in 1984), Bankruptcy Rule 9020 (as adopted in 1983) and Bankruptcy Rule 9020 (as amended in 1987) are reproduced at Appendix B.

STATEMENT OF THE CASE

In February of 1983, Robert A. Wolk, t/a Wolk Dental Labs ("Wolk"), obtained a judgment against Barry A. Dubin ("Dubin or "Debtor"). This judgment remained outstanding when, on April 20, 1983, Dubin filed a voluntary petition pursuant to the provisions of Chapter 11 of the Bankruptcy Code (the "Code"), 11 U.S.C. § 101, *et seq*. Shortly thereafter, Dubin's Chapter 11 case was voluntarily converted to a Chapter 7 liquidation case.

Pursuant to the provisions of the Code, Dubin duly filed a Schedule of Assets and Liabilities, and a Statement of Affairs, both of which are required to be filed. Amendments were subsequently filed. In response to a question on the Statement of Affairs dealing with the status of any lawsuits against the Debtor, Dubin duly listed Wolk's judgment. However, the Schedule of Assets and Liabilities inadvertently omitted this judgment as a liability against Dubin's estate.

On (or about) January 23, 1984, Frank Jakobowski, Esquire ("Jakobowski"), on behalf of his client, Wolk, caused a Writ of Execution (the "Writ") to be issued in an effort to collect upon Wolk's judgment. As a result of the issuance of this Writ,

Dubin's bank account at Girard Bank was attached and "frozen".

On January 30, 1984, Dubin's counsel, Myron A. Bloom, Esquire ("Bloom") notified Jakobowski orally and in writing of the pendency of the bankruptcy case, and requested that steps be taken to dissolve the Writ. Bloom also delivered to Jakobowski a copy of the voluntary petition that was filed on April 20, 1983. That petition indicated that an Order for Relief under the Bankruptcy Code had been entered by former Chief Bankruptcy Judge Emil F. Goldhaber on April 20, 1983.

Jakobowski refused to dissolve the Writ. As a result, on February 3, 1984, Dubin, by his counsel, filed a Motion for Contempt (the "Motion") against Wolk in the United States Bankruptcy Court for the Eastern District of Pennsylvania. The Motion was scheduled for a hearing on February 6, 1984, and was continued to February 27, 1984. On February 17, 1984, Bloom wrote to Jakobowski, advising him of the pending Motion and again requesting that Jakobowski dissolve the Writ. Wolk appeared at the February 27, 1984 hearing, without counsel. At that hearing, the Bankruptcy Court entered an Order directing that Wolk be held in contempt for every day that the Writ was not dissolved beyond March 2, 1984. The court also ordered Wok to direct his counsel, Jakobowski, to dissolve the Writ.

In a letter dated March 1, 1984, addressed to Judge Goldhaber, Wolk informed the court that despite Wolk's request, Jakobowski refused to dissolve the Writ. Accordingly, on March 23, 1984, Bloom was compelled to file a Property Exemption Claim on behalf of Dubin with the Office of the Sheriff of Philadelphia County, so as to prevent Jakobowski from scheduling a Sheriff's Sale of Dubin's assets — assets of the Debtor's Chapter 7 Estate. Dubin then filed a Complaint for Injunctive and Other Relief against Jakobowski (the "Complaint"). Thereafter, on March 30, 1984, Dubin filed a Motion for Preliminary Injunction (the

"Injunction Motion") against Jakobowski, seeking to have the Writ immediately dissolved. The Bankruptcy Court scheduled a hearing on the merits of the Injunction Motion for April 26, 1984. Dubin appeared at the designated time and place for hearing, but Jakobowski did not. After the presentation of testimony, the Bankruptcy Court entered an Order directing Jakobowski to immediately take action to dissolve the Writ. Rather than do so, on May 4, 1984, Jakobowski filed a Notice of Appeal and a Motion for a Stay Pending Appeal. Jakobowski also filed a Motion to Dismiss the Complaint (the "Dismissal Motion") despite his testimony (given at a subsequent hearing) that he earlier had stated his intention not to oppose any action taken by Bloom to obtain a court order allowing the Writ to be dissolved (the Dismissal Motion was denied).

On May 16, 1984, Judge Goldhaber granted Jakobowski's Motion for Stay Pending Appeal on the condition that Jakobowski file a $10,000 supersedeas bond with a corporate surety. On May 29, 1984, Jakobowski filed, although not timely, the supersedeas bond.

On June 6, 1984, without obtaining any relief from the automatic stay provisions of the Code, 11 U.S.C. § 362, or any other form of order permitting him to do so, and by now fully aware of his obligation (and the restraints imposed upon him by the Code's automatic stay provisions), Jakobowski filed a Petition for Supplementary Relief in Aid of Execution on the Writ in the Philadelphia Court of Common Pleas (the "Petition"). Bloom was compelled to answer the Petition to protect Dubin's interests. That Petition was subsequently denied by the Honorable A. DiBona of the Philadelphia Court of Common Pleas.

In a Memorandum and Order dated February 8, 1985, Chief Judge John P. Fullam of the United States District Court for the Eastern District of Pennsylvania affirmed Judge Goldhaber's

Order of April 26, 1984, that required Jakobowski to dissolve the Writ. From the period of February 8, 1985, to May 16, 1985, Jakobowski made no effort to inform Dubin or Bloom of the status of the Writ. However, on February 26, 1985, over two weeks after the entry of Judge Fullam's Order, Jakobowski filed a Praecipe to dissolve the Writ. On April 26, 1985, unaware that the Writ had been dissolved, and after learning that the Dubin bank account was still 'frozen", Bloom wrote to Judge Goldhaber requesting him to enter an Order dissolving the Writ. In the letter, Bloom informed the Bankruptcy Court of the fact that the Dubin bank account was still "frozen", and sent a copy of the letter to Jakobowski asking him to correct any misstatements made in the letter. Jakobowski, though knowing that the Writ had been dissolved, notified neither Bloom nor the Bankruptcy Court of that fact; as a result, on June 17, 1985, Judge Goldhaber signed an Order declaring the Writ null and void.

On September 29, 1986, Jakobowski filed his second Motion to Dismiss the Complaint (the "Second Motion"). The Second Motion was briefed, argued by the parties, and on January 9, 1987, Bankruptcy Judge Bruce I. Fox (Judge Goldhaber having retired) entered an order denying the Second Motion. Subsequently, an Answer to the Complaint was duly filed. Jakobowski, by that time, had the benefit of Judge Fullam's Order directing Jakobowski to dissolve the Writ. Clearly, that Order did not deter Jakobowski from expanding this litigation far out of proportion.

On April 1, 1987, a hearing on the merits of the Complaint was held before Judge Fox. At the close of testimony on April 1, 1987, Judge Fox continued the hearing until April 15, 1987. On April 15, 1987, further testimony was taken and the hearing concluded.

On April 8, 1988, Judge Fox entered an Order awarding

Dubin $2,550 in compensatory damages. Judge Fox did not award Dubin punitive damages, but did grant counsel leave to apply for attorneys' fees and costs, holding that such an award would adequately serve as a deterrent to future violations of the automatic stay. In the Opinion which accompanied the April 8, 1988 Order, Judge Fox found that Jakobowski was in civil contempt of the court because of his violation of the automatic stay provisions of Section 362 of the Code, 11 U.S.C. § 362. On April 15, 1988, Jakobowski filed a Notice of Appeal from the April 8, 1988 Order.

A motion for fees and costs, in the form of a fee application (the "Application"), was then filed with the court by Dubin's counsel. On September 8, 1988, after a hearing on the merits of the Application, Judge Fox filed a Memorandum and Order awarding $15,480 in fees and $261 in costs. Jakobowski then filed a Notice of Appeal of the September 8, 1988 Order, and thereafter filed a Motion for Stay Pending Appeal. On September 27, 1988, the District Court granted Defendant's Motion for Stay Pending Appeal and required Jakobowski to post a $20,000 bond, which bond was duly posted.

On January 27, 1989, Judge Fullam entered an Order affirming the consolidated Orders of Judge Fox that awarded damages, attorneys' fees and costs to Dubin. In an accompanying Memorandum, Judge Fullam concluded that Judge Fox had correctly determined that the Bankruptcy Court was authorized to issue a finding of civil contempt, and could award damages, fees and costs arising from that contempt. Although Judge Fullam found Jakobowski's appeal "frivolous", he declined to award fees and double costs to Dubin pursuant to Federal Rule of Appellate Procedure 38, reasoning that the Rules are only applicable to courts of appeals.

On June 29, 1989, the Court of Appeals for the Third Circuit issued a Memorandum Opinion afffrming the Order of the District

Court. The Court of Appeals held that the actions of Jakobowski "placed him in contempt of the automatic stay created by the filing of the Dubin bankruptcy petition" and that the Bankruptcy Court "has the legal authority to hold a person in civil contempt."

SUMMARY OF THE ARGUMENT

The Court should deny the Petition for a Writ of Certiorari for three reasons. First, despite Jakobowski's argument to the contrary, there is no conflict between Circuits, as the Courts of Appeals for both the Third and Ninth Circuits have held that in 1984 bankruptcy courts could hold a person in contempt and award sanctions for a violation of the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362. Second, bankruptcy courts have always had the authority to issue citations for contempt of court. Since the enactment of the Bankruptcy Reform Act of 1978, Pub. L. 95-598 (92 Stat. 2549), bankruptcy courts have had the inherent authority to issue orders which are necessary or appropriate to carry out the provisions of the Code. This authority extends to the imposition of sanctions for the willful refusal to comply with orders of a bankruptcy court dealing with violations of the automatic stay. In 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. (98 Stat. 333) which, *inter alia,* amended the automatic stay provisions of the Code, 11 U.S.C. § 362, but in doing so only clarified previous inherent authority by providing express authority for bankruptcy courts to enter orders imposing sanctions against any person found to have violated that section. Third and finally, in 1987 this Court approved an amendment to Bankruptcy Rule 9020 to provide express authority for bankruptcy courts to issue citations for contempt of court, thus rendering the issue raised by the petitioner as not sufficiently important for this Court to grant certiorari.

REASONS FOR DENYING THE WRIT

I.

There is no conflict between Circuits, since the decision of the Court of Appeals for the Third Circuit that a bankruptcy court had (in 1984) legal authority to hold a person in civil contempt for a violation of the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, is consistent with the decisions of the Court of Appeals for the Ninth Circuit.

Jakobowski posits that the decision by the Court of Appeals for the Ninth Circuit in *Plastiras v. Idell (In re Sequoia Auto Brokers Ltd., Inc.)*, 827 F.2d 1281 (9th Cir. 1987) is in direct conflict with the June 29, 1989 decision of the Court of Appeals for the Third Circuit, thus requiring this Court to grant the Petition for a Writ of Certiorari to resolve a "conflict in the circuits". In his Petition, Jakobowski contends that the issue before the Court of Appeals for the Ninth Circuit was "whether a bankruptcy judge has jurisdiction to issue a civil contempt order." (*See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at page 5.) However, Jakobowski has mischaracterized the issues which the Court of Appeals for the Ninth Circuit actually confronted in *Sequoia*. In fact, the decision in *Sequoia*, and other decisions from the Ninth Circuit, are not in conflict, and are indeed in harmony with the decision of the Court of Appeals for the Third Circuit at issue.

In *Sequoia, id.*, Ira P. Idell, the sole shareholder, officer, director, and manager of Sequoia Auto Brokers, Ltd., Inc. filed a voluntary personal bankruptcy petition. Subsequently, creditors filed an involuntary Chapter 7 petition against Sequoia. The Bankruptcy Court ordered Idell to file the corporate statement of affairs, schedules and master mailing list of creditors, as required by Section 521 of the Bankruptcy Code, 11 U.S.C. § 521.

Idell refused to comply with the court order by failing to appropriately respond to the questions included in the statement of affairs and schedules and by refusing to file a master mailing list. After issuing an order to show cause why he should not be held in contempt for failing to file the required documents, the Bankruptcy Court cited Idell for contempt and referred the matter to the District Court. The District Court remanded the matter back to the Bankruptcy Court to determine whether the Bankruptcy Court wished to impose criminal or civil contempt sanctions. The Bankruptcy Court found Idell in civil contempt, but since his financial condition did not permit the imposition of monetary sanctions, ordered him imprisoned until he complied with the court's order. On appeal, a different District Court judge held that Idell's answers to the statement of affairs and schedules were appropriate and reversed the contempt order. The Court of Appeals for the Ninth Circuit affirmed and, *in dicta*, opined as to the contempt authority of bankruptcy courts.

In the case at bar, the Bankruptcy Court held that Jakobowski violated the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, and awarded damages based on 11 U.S.C. § 105. As originally promulgated in 1978, 11 U.S.C. § 105(a) provided:

> The Bankruptcy Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.

It is important to note that the statute violated in *Sequoia, id.*, was 11 U.S.C. § 521, while the statute violated in the instant case was the automatic stay provision of the Code, 11 U.S.C. § 362. This is crucial, as one month prior to their decision in *Sequoia, id.*, the Court of Appeals for the Ninth Circuit, in *Computer Communications, Inc. v. Codex Corporation, Inc. (In re Computer Communications, Inc.)*, 824 F.2d 725 (9th Cir. 1987), confronted the issue of whether the issuance of a citation for

contempt was appropriate for a violation of the provisions of the automatic stay of the Code (as opposed to other provisions of the Code). The Court of Appeals held that:

> [a] party who violates the automatic stay may be held in contempt and the court may award damages to compensate the other party for actual loss suffered . . . We hold that awarding damages to CCI for Codex's violation of the automatic stay was within the discretion of the bankruptcy court.

Computer Communications, 824 F.2d at 731.

The Court of Appeals for the Ninth Circuit itself has therefore already addressed the alleged "conflict" by reconciling its own opinions in this area and has reached the same conclusion as the Court of Appeals for the Third Circuit, when confronted with violations of the automatic stay provisions of the Code (as opposed to violations of other provisions of the Code).

Since that time, one court has had occasion to analyze and review the manner in which the Court of Appeals for the Ninth Circuit has harmonized its decisions. In a well reasoned opinion in *Wagner v. Piper Industries (In re Wagner),* 87 Bankr. 612 (Bankr. C.D. Cal. 1988), the Bankruptcy Court noted that the primary distinction in the two cases from the Court of Appeals for the Ninth Circuit was that in *Computer Communications,* 824 F.2d 725, the court was faced with a situation involving the imposition of sanctions for violation of the *automatic stay*, while in *Sequoia,* 827 F.2d 1281, the court was confronted with a situation which was subsequently dealt with by the 1987 amendment to Bankruptcy Rule 9020. *Wagner,* 87 Bankr. at 616.

Wagner, id., involved a cause of action based on 11 U.S.C. § 524 "the post-discharge analogue of Section 362." *Wagner,*

87 Bankr. 616. The Bankruptcy Court, in relying on the analysis of *Computer Communications,* 824 F.2d 725, held that there is "no reason to distinguish between Section 362 and Section 524; remedial damages are appropriate whenever a violation of either provision takes place." *Wagner,* 87 Bankr. at 617. Therefore, the bankruptcy courts in the Ninth Circuit are able to apply both cases without conflict.

Subsequently, the Court of Appeals for the Ninth Circuit, in *Gonzales v. Parks,* 830 F.2d 1033 (9th Cir. 1987), a case which was decided prior to the 1987 Amendments to Bankruptcy Rule 9020, *in dicta,* stated that a bankruptcy court does have the authority to impose sanctions if that authority is founded upon valid law. Since the authority to impose sanctions for a violation of 11 U.S.C. §§ 362 and 524 (as enacted in 1978) was granted by Congress when it allowed the statutes to become law, the opinions by the Court of Appeals for the Ninth Circuit in *Sequoia,* 827 F.2d 1281 and *Computer Communications,* 824 F.2d 725 are in accord and there is no conflict either with the Court of Appeals for the Third Circuit or within the Court of Appeals for the Ninth Circuit.

In 1984, 11 U.S.C. § 362 was amended by the addition of subsection (h), which states:

> An individual injured by any willful violation of a stay provided by this section *shall* recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. (Emphasis added.)

11 U.S.C. § 362(h). Even though the reasons for the statutory addition have not been stated it is clear that the award of damages is now mandatory. 2 *Collier on Bankruptcy,* ¶ 362.12 (15th Ed. 1989).

In addition to the foregoing, the nature of the contempt citations issued in *Sequoia,* 827 F.2d 1281, and the instant case are dissimilar. Even though both contempt citations were labeled "civil", the contempt order entered by the Bankruptcy Court in *Sequoia,* 827 F.2d 1281, was, in actuality, criminal. As noted by the Court of Appeals for the Ninth Circuit, "[c]ivil contempt is a refusal to do an act the court has ordered for the benefit of a party; the sentence is punitive to vindicate the authority of the court." *Sequoia,* 827 F.2d at 1283, n.1 [*citing Gompers v. Bucks Stove & Range Company,* 221 U.S. 418, 441 (1911)]. Civil contempt is employed to coerce a person into compliance with the court's order and to compensate for losses sustained. *McDonald's Corp. v. Victory Investments,* 727 F.2d 83 (3d Cir. 1984). *See also, United States v. United Mine Workers of America,* 330 U.S. 258 (1947). In *Sequoia,*827 F.2d 1281, the contemnor, Idell, was incarcerated. Notwithstanding calling the contempt civil, since the debtor could not be "compensated for losses sustained", it was, in reality, criminal. Criminal contempt involves an entirely distinct analysis which is inapplicable to the case at bar. A criminal contempt sanction is necessary only to vindicate the dignity of a bankruptcy court and thus not an order to effectuate the provisions of the Code. *Tele-Wire Supply Corp. v. Presidential Financial Corporation, Inc. (In re Industrial Tool Distributors, Inc.),* 55 Bankr. 746, 750 (Bankr. N.D. Ga. 1985). Therefore, even if *Gonzales,* 830 F.2d 1033, and the analysis of the authority based on the different sections of the Code are discounted, *Plastiras v. Idell (In re Sequoia Auto Brokers Ltd., Inc.),* 824 F.2d 1281 (9th Cir. 1987) may be construed as correctly decided and not in conflict with the Third Circuit.

Jakobowski requests that this Court grant his Petition for a Writ of Certiorari based upon his argument that there exists a conflict between the Courts of Appeals for the Third and Ninth Circuits. For a conflict to exist, it must be a real conflict on the same matter of law, not merely an inconsistency *in dicta.* This

Court on occasion has dismissed a Writ of Certiorari as improvidently granted where subsequent examination reveals that the alleged conflict giving rise to the grant does not in fact exist. *Layne & Bowler Corp. v. Western Wall Works,* 261 U.S. 387, 392-393 (1923). As set forth above, even, *arguendo,* if it appears a conflict exists, the analysis by the Court of Appeals for the Ninth Circuit of the contempt power of a bankruptcy court was *dicta*. Therefore, no conflict exists.

If a true conflict exists between the Courts of Appeals for the Third and Ninth Circuits, a petition for a writ of certiorari may be denied "when it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences . . . " *See* Mr. Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 Australian L.J. 108 (1959). Additionally, if the statute upon which the controversy rests has been amended in a manner which will prevent the problem from arising in the future, certiorari may be denied despite a square conflict. *See e.g., United States v. Abrams,* 344 U.S. 855 (1952). As discussed above, the 1984 enactment of 11 U.S.C. § 362(h) has clearly granted to bankruptcy courts both the authority and the duty to award damages for a violation of the automatic stay provisions of the Code, 11 U.S.C. § 362. As will be set forth with greater specificity below, the passage of the 1987 Amendments to Bankruptcy Rule 9020, which expressly provides for contempt proceedings, has vitiated the import of *Plastiras v. Idell (In re Sequoia Auto Brokers Ltd., Inc.),* 827 F.2d 1281 (9th Cir. 1987).

It is clear that not only does *no* conflict exist between the Courts of Appeals for the Third and Ninth Circuits, but that the two Circuits reached the *same* conclusion on the authority of bankruptcy courts to issue contempt citations for violations of the automatic stay provisions of the Code, 11 U.S.C. § 362. As

a result of the 1984 enactment of 11 U.S.C. § 362(h), bankruptcy courts are required to award damages for a violation of the automatic stay provisions of the Code, 11 U.S.C. § 362. Finally, even if a conflict did exist, subsequent legislation (the 1987 Amendment to Bankruptcy Rule 9020) has determined that bankruptcy courts have the power to issue contempt citations.

II.

The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353 (98 Stat. 333) merely more carefully defined the inherent authority of a bankruptcy court to issue citations of contempt for violations of court orders.

In *Plastiras v. Idell (In re Sequoia Auto Brokers Ltd., Inc.),* 827 F.2d 1281 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit concluded that since the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353 (98 Stat. 333) ("BAFJA") did not include any specific reference dealing with the civil or criminal contempt power of a bankruptcy judge, that none exists. Such analysis misstates the effect of the BAFJA.

The subject of contempt was expressly dealt with by Section 41 of the Bankruptcy Act of 1898, Ch. 541 (30 Stat. 544), 11 U.S.C. § 69 (repealed 1978), entitled "Contempts Before Referees". Under the Bankruptcy Act of 1898, the referee in bankruptcy had no power to either hold a party guilty or provide punishment for being in contempt of court.

In 1973, this Court, pursuant to its rule making power, approved the final draft prepared by the Advisory Committee on Bankruptcy Rules and submitted the same to Congress as required by the enabling statute. The Bankruptcy Rules changed the title from "referee in bankruptcy" to "bankruptcy judge" and contained a new rule which, for the first time, dealt directly

with the subject of contempt committed in connection with a bankruptcy case referred to the bankruptcy judge. Bankruptcy Rule 920 expressly recognized the power of a bankruptcy judge to cite and punish for civil contempt, with the limitation that the fine imposed could not exceed $250 and that the bankruptcy judge had no power to order imprisonment of one found to be in contempt. According to the notes of the Advisory Committee the rule was merely a recognition of the inherent power of a court of competent jurisdiction to enforce its own orders and to punish for disobedience of a lawful order for contempt. Therefore, a bankruptcy judge had the power to issue a contempt citation with the aforementioned limitations.

The Bankruptcy Reform Act of 1978, Pub. L. No. 50-598 (92 Stat. 2549), completely reconstructed the bankruptcy system. As part of this legislation, Congress enacted 28 U.S.C. § 1481 (1978) which granted the newly constructed bankruptcy courts with the powers of a court of equity, law, and admiralty. This section only dealt with the subject of contempt by way of limitation by providing that a bankruptcy court was not authorized to punish for criminal contempt that was not committed in the presence of the bankruptcy judge or warranted a punishment of imprisonment. Once again, the inherent authority to issue a contempt citation was limited, but not eliminated.

In 1982, this Court issued its decision in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50 (1982), which invalidated the jurisdictional grant by the Bankruptcy Reform Act of 1978. 28 U.S.C. § 1471, *et seq.* (1978). This Court held that 28 U.S.C. § 1471, because it permitted the bringing of a party involuntarily into a bankruptcy court to decide a question of state law, was unconstitutional. This Court did not construe the Constitution as prohibiting Congress from vesting sufficient authority in Article I bankruptcy courts for them to

perform their essential functions. As set forth in the pluarality opinion:

> when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created.

Northern Pipeline, 458 U.S. at 83.

The concurring opinion emphasized that the holding was restricted to the unconstitutionality of the jurisdictional grant to the bankruptcy judge of the power to adjudicate claims or causes of action based upon state law.

Additionally, the concurrence saw no need to decide the constitutionality of the jurisdictional grant of other Article III judicial powers. Accordingly, both the plurality and concurrence agreed that adjudication of causes of action based upon state law was a judicial power and that under the constitutional grant, that judicial power could only be exercised by an Article III court.

In the case at bar, the issue is whether a debtor has a right to have his affairs fully determined in a bankruptcy court. This is a federal right explicity recognized by the United States Constitution, Article I, Section 8, Clause 4. Determining whether civil contempt has been committed involves only considerations of whether the party knew about a lawful order and whether there

was compliance. Since that determination does not involve private rights under non bankruptcy law and does not offend the Constitition, it is not violative of the holding in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50 (1982).

III.

Any conflict which may, *arguendo*, have existed has been rendered moot by the 1987 Amendments to Bankruptcy Rule 9020.

At the time the causes of action in both this case and *Plastiras v. Idell (In re Sequoia Auto Brokers Ltd., Inc.)*, 827 F.2d 1281 (9th Cir. 1987) arose, Bankruptcy Rule 9020 provided a mechanism for bankruptcy courts to impose sanctions for criminal contempt only. The Rule limited a bankruptcy court's inherent authority to order "*[c]riminal* contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481 . . . " (emphasis supplied). If it appeared to the bankruptcy court that the criminal contempt occurred but was outside the scope of the bankruptcy court's power under 28 U.S.C. § 1481, the bankruptcy judge could "certify the facts to the district court."

In 1987, this Court approved an amendment to Bankruptcy Rule 9020. The Rule was retitled "Contempt Proceedings" and now states, in pertinent part:

> (b) Other Contempt. Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in Subdivision (a) of this Rule, may be determined by a bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or

> civil and shall state the time and place of hearing, allowing a reasonable time for preparation of the defense . . .
>
> (c) Service and Effective Date of Order; Review. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective ten days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within a ten day period, the entity therein serves and files with the clerk objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033(b).

The 1987 Advisory Committee Note to Rule 9020 states that:

> sound judicial administration requires that the initial determination of whether contempt has been committed should be made by the bankruptcy judge. If timely objections are not filed to the bankruptcy judge's order, the order has the same force and effect as an order of the district court. If objections are filed within ten days of service of the order, the district court conducts a *de novo* review pursuant to Rule 9033 and any order of contempt is entered by the district court upon completion of the court's review of the bankruptcy judge's order.

Bankruptcy Rule 9020 (Amended 1987), Advisory Committee Note.

It is therefore evident that currently a bankruptcy court has

the authority to issue citations for contempt, with certain limited restrictions imposed upon their authority to issue citations for criminal contempt. If there ever existed a conflict between the Courts of Appeals for the Third and Ninth Circuits, this Court, by the approval of the Amendment to Bankruptcy Rule 9020, has eliminated such a conflict. As a result any potential conflict no longer exists and the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Jakobowski has utilized the judicial process to the detriment of Dubin. His travels have taken him from the Philadelphia County Court of Common Pleas through the federal judiciary and he now finds himself on the doorstep of this Court. He has evidenced an absolute disregard for the judicial process and, now, seeks to invoke this Court's jurisdiction on a matter where there exists no conflict and alternatively has been rendered moot by Congress. For the foregoing reasons, it is respectfully requested that this Court deny the Petition for Writ of Certiorari and award respondent appropriate costs.

Respectfully submitted,

STEVEN D. USDIN
Counsel of Record
ROBERT M. BOVARNICK
ADELMAN LAVINE GOLD
AND LEVIN
Attorneys for Respondent

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 8, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 84-3022

BARRY A. DUBIN,

Appellee

v.

FRANK A. JAKOBOWSKI, ESQ.,

Appellant

MEMORANDUM AND ORDER

FULLAM, J. FEBRUARY 8, 1985

This is an appeal from a bankruptcy judge's Order, entered April 26, 1984, directing the appellant, an attorney, to take immediate steps to dissolve an attachment of a bank account of the debtor.

The appellant, Frank M. Jakobowski, is attorney for Robert Wolk, trading as Wolk Dental Laboratory, a creditor of the debtor, who is a dentist named Barry A. Dubin. Before bankruptcy, Wolk, with Jakobowski's assistance, had obtained a judgment against the debtor, in the Court of Common Pleas of Philadelphia County (No. 1095 February Term 1982). On April

20, 1983, Dr. Dubin filed a petition in bankruptcy. The Wolk judgment was listed in the debtor's Amended Statement of Affairs but was inadvertently omitted from the A-3 schedule.

On January 23, 1984, notwithstanding the pending bankruptcy proceeding with its automatic stay, Jakobowski, on behalf of Wolk, issued execution on the judgment, and attached a bank account maintained by Dubin at Girard Bank. On January 30, 1984, counsel for the debtor formally notified Jakobowski's office of the pending bankruptcy proceeding and the automatic stay, and requested that the attachment be dissolved. The request was not complied with.

Counsel for the debtor thereupon filed a motion for an adjudication of contempt against Wolk. A hearing on this application was held on February 27, 1984. Wolk appeared at that hearing, unrepresented by counsel. The bankruptcy judge entered an order directing that Wolk be held in contempt, subject to a fine for each and every day beyond March 2, 1984, that the attachment remained in effect. The bankruptcy judge also ordered Wolk to direct his counsel, Jakobowski, to dissolve the writ of execution.

By letter dated March 1, 1984, Wolk informed the bankruptcy judge that he had directed Jakobowski to cause the attachment to be dissolved, but that Jakobowski refused to comply with that request.

The debtor thereupon brought an adversary proceeding against Jakobowski, by filing a complaint for injunctive and other relief on March 28, 1984. On March 30, 1984, the debtor filed a motion for preliminary injunction. A hearing on that motion was held April 26, 1984. The hearing was held on that date,

although Jakobowski did not appear. At the conclusion of the hearing, and after having waited a suitable interval for Jakobowski to appear, the bankruptcy judge entered the Order appealed from. Eventually, upon posting of a bond, the Order was stayed pending the outcome of this appeal.

Appellant Jakobowski makes several arguments, none of which has even colorable merit. It is first contended that the Order appealed from is not supported by substantial evidence in the record because, at least according to appellant's original assertions, there was no evidentiary hearing preceding it. This is simply incorrect: the bankruptcy judge did hold a hearing, and heard evidence which adequately supports the Order entered.

It is further contended that the Order represents a violation of appellant's right to due process of law, because it was entered after a hearing held in his absence. The record discloses that when the original contempt citation was sought against Wolk, neither Mr. Jakobowski nor Mr. Wolk appeared at the scheduled hearing. The hearing was then adjourned, and counsel for the debtor subpoenaed Mr. Wolk, and thus obtained his attendance; Mr. Jakobowski did not appear. When the adversary proceeding against Mr. Jakobowski was scheduled for hearing, Mr. Jakobowski apparently sent word to the bankruptcy judge's staff that he would be one-half hour late, would be unable to arrive until 10:45 a.m., and therefore requested that the matter be placed at the end of that day's list. This was done. The end of the list was reached shortly after noon, but Mr. Jakobowski still had not appeared, nor had he sent any further word. In these circumstances, the due process argument rings hollow indeed. Moreover, Mr. Jakobowski did not seek reconsideration of the Order on that (or any other) ground, but instead filed an immediate appeal.

Appendix A

Appellant's remaining arguments reflect a total misunderstanding of bankruptcy law and procedures. Whether or not the Wolk debt is dischargeable in the Dubin bankruptcy has no bearing upon Wolk's, and appellant's, obligations to recognize the automatic stay, and to comply with orders of the bankruptcy judge. The bankruptcy judge had jurisdiction to enter the contempt order against Wolk; this was a "core" proceeding, not a "related" matter. The Court of Common Pleas of Philadelphia County is not the appropriate tribunal for the present dispute. Finally, although irrelevant to the present proceeding, the dischargeability of the Wolk debt is not affected by the inadvertent failure to list it on the A-3 schedule. Wolk was aware of the bankruptcy, the debtor was aware of the debt, and Wolk had (and still has) ample opportunity to file a proof of claim.

The Order appealed from will therefore be affirmed.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 84-3022

BARRY A. DUBIN,

Appellee

v.

FRANK A. JAKOBOWSKI, ESQ.,

Appellant

ORDER

AND NOW, this 8th day of February, 1985, it is ORDERED that the April 26, 1984 Order granting injunctive relief against the defendant/appellant Frank A. Jakobowski, Esq. (correctly designated as Frank M. Jakobowski, Esq.) is AFFIRMED.

s/ John P. Fullam
J.

ENTERED: Filed February 12, 1985

APPENDIX B — RELEVANT STATUTES

BANKRUPTCY CODE

SECTION 362 (11 U.S.C. § 362)

§ 362 Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out

of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by such commodity broker, forward contract merchant, stockbroker, or securities clearing agency to margin, guarantee, or secure commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; and

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing—

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

Appendix B

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

Appendix B

BANKRUPTCY CODE

SECTION 362 (11 U.S.C. § 362)

§ 362. **Automatic stay.**

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stock-

broker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [*sic*]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the en-

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* [*Ed. Note:* Paragraphs (12) and (13) were added to 11 U.S.C. § 362(b) by § 5001 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 (1986). Section 5001(b) of Pub. L. No. 99-509 provides:

(Cont'd)

try of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a

(Cont'd)

"the amendments made by subsection (a) of this section shall apply only to petitions filed under section 362 of this title 11, United States Code, which are made after August 1, 1986."

This is inaccurate. "Petitions" are not made under § 362. The proper reference probably should be to "requests" made pursuant to § 362(d). If "petitions" were intended, then the reference should be to "cases commenced."

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.]

hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there

is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Appendix B

RULES OF BANKRUPTCY PROCEDURE

Rule 9020.

CRIMINAL CONTEMPT PROCEEDINGS

(*a*) *Procedure.*

(*1*) *Summary Disposition.* Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481 may be punished summarily by a bankruptcy judge if he saw or heard the conduct constituting the contempt and if it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(*2*) *Disposition After a Hearing.* Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481, except when determined as provided in paragraph (1) of this subdivision, may be punished by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the criminal contempt charged and describe the contempt as criminal and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(*3*) *Certification to District Court.* If it appears to a bankruptcy judge that criminal contempt has occurred but the court is without power under 28 U.S.C. § 1481, to punish or to impose the appropriate punishment for the criminal contempt the judge may certify the facts to the district court.

Appendix B

(*b*) ***Right to Jury Trial.*** Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Appendix B

Rule 9020.

CONTEMPT PROCEEDINGS

(*a*) *Contempt Committed in Presence of Bankruptcy Judge.* Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(*b*) *Other Contempt.* Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(*c*) *Service and Effective Date of Order; Review.* The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files with the clerk objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

(*d*) *Right to Jury Trial.* Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.